Buffalo Law Review

Volume 44 | Number 2 Article 6

4-1-1996

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Recommended Citation
Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol44/iss2/6

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A Primer on the New Habeas Corpus Statute

LARRY W. YACKLE†

The Antiterrorism and Effective Death Penalty Act (Pub. L. 104-132), signed into law on April 24, 1996, represents Congress' attempt to deal with the problems deemed to beset federal habeas corpus for state prisoners. This new statute addresses many important aspects of habeas law and practice and, as to them, now occupies the field to the exclusion of previous arrangements—whether developed as a construction of preexisting statutes or as interstitial decisional law. On the whole, however, Pub. L. 104-132 presupposes the basic framework now in place. This matter-of-fact point (that the new statute takes the preexisting habeas landscape as its baseline) will be of vital significance for the interpretive task that lies ahead.

That task will not be easy. The new law is not well drafted. It bears the influence of various bills that were fiercely debated for nearly forty years. Along the way, proponents of habeas legislation adjusted their initiatives in light of contemporaneous events and circumstances: the Powell Committee Report in 1989, for example, as well as shifting levels of political support for particular measures and new Supreme Court decisions on point. Proponents often kept abreast of the times by adding new elements to their bills without, at the same time, reexamining old formulations in order to maintain an intellectually coherent whole. The result, I am afraid, is extraordinarily arcane verbiage that will require considerable time and resources to sort out.

Pub. L. 104-132 will require a practical, problem-solving brand of construction that *makes* this new law fit into an overarching system of federal jurisdiction that promises to work--with limited disruptions and in fairness to all. For my part, the Supreme Court's approach to the problem in *McFarland v. Scott*,[1] is a good illustration.[2] The statutes before the Court in that instance were hardly a

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1. 114 S. Ct. 2568 (1994).

2. Readers are entitled to know that I filed an *amicus* brief in *McFarland* on behalf of

marvel of clarity, and it was possible to read them in a manner that produced inconvenience and unfairness. Yet the Court managed to achieve a sensible result. That is the kind of judicial pragmatism that will be needed in the elaboration of Pub. L. 104-132.[3]

In this early treatment of the new statute, I want to review the principal adjustments Pub. L. 104-132 makes to the process of federal habeas adjudication. But then I mean to focus primary attention on the provision that has drawn the lion's share of attention, both in Congress and in professional and academic circles. Previously, 28 U.S.C. § 2254(d) governed the effect the federal habeas courts must give to state court findings of historical fact. Pub. L. 104-132 has now reconfigured that section to prescribe the effect the federal courts must give to prior state court judgments on the merits of federal claims:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State proceeding.[4]

This new provision goes not to the process by which the federal courts adjudicate claims, but to the substance of the federal courts' judgment on the merits. This is to say, § 2254(d) covers the

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the American Civil Liberties Union, in which I endorsed the interpretation that Mandy Welch persuaded the Court to place on the statutes involved in that case. While it is true that the prisoner was successful in *McFarland*, the point I am making here about pragmatic statutory interpretation is neutral with respect to outcomes. *Cf.* West Virginia University Hosp. v. Casey, 111 S. Ct. 1138, 1148 (1991) (explaining that ambiguous statutes should be construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. . .[and thus] to make sense rather than nonsense out of the *corpus juris*").

3. Of course, the hard work will fall on federal district and circuit courts. Congress has acted and will hardly be inclined to take habeas up again any time soon, irrespective of the problems its product raises. The Supreme Court will be available to resolve any divisions of authority that develop. But the country can scarcely wait for the Court itself to address in the first instance the many questions presented.

4. While paragraph (1) of this new version of § 2254(d) has drawn more attention to date, paragraph (2) may in time prove just as significant. On its face, paragraph (2) invites the federal courts to reopen a state court's adjudication of the facts underlying a federal claim in order to determine whether the state court reasonably assessed the evidence. And this notwithstanding the general rule that state court findings of historical fact are presumptively correct. 28 U.S.C. § 2254(e)(1), *as amended by* Antiterrorism and Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter *as amended*].

ground previously ruled by the Court's decisions in *Brown v. Allen*,[5] *Teague v. Lane*,[6] and subsequent cases in the *Teague* line. Federal habeas corpus for state prisoners has always been guided both by Congress and by the Court, each contributing in its own time and place to the formulation and evolution of controlling principles.[7] This new statute is yet another instance of that familiar pattern.

The point to keep in mind is that § 2254(d) must be reconciled with the other provisions of Pub. L. 104-132 enacted with it, with the provisions of existing law that Pub. L. 104-132 leaves untouched, with the current of legislative history from which this particular provision emerged, and with the explanation for Pub. L. 104-132 in general (and this section in particular) offered by its proponents at the time of passage. This new provision does make a change, of course, but it is only this. Previously, the familiar statement of a federal court's duty to determine a prisoner's federal claim "*de novo*" left the impression that the federal court was to act without any necessary or explicit reference to a prior state court judgment. Now, under § 2254(d), a federal court does not begin entirely afresh, but takes a previous state court judgment as the starting point for federal habeas adjudication. That federal adjudication remains independent; it is just that the question on which independent federal judgment is brought to bear is whether, after adjudicating the merits of the claim, the state court reached the correct conclusion.

Under § 2254(d), a federal court is not to take up a claim as though it were writing on a clean slate, perhaps mentioning a previous state court judgment in passing. By contrast, the federal court is to begin with the work already done on the claim in state court and ask, first and foremost, whether the state court arrived at the correct outcome. In this way, the federal court takes serious account (but not controlling account) of the best available thinking on the claim at bar—the prior adjudication of that very claim in state court. This framework for the federal courts' function in habeas corpus is related to, but plainly distinguishable from, the hierarchical structure of a routine appellate jurisdiction to review state court judgments for error.

I confess that I had expected this Congress to attack the conventional role of federal habeas more vigorously, installing, per-

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5. 344 U.S. 443 (1953).

6. 489 U.S. 288 (1989).

7. *See* Wainwright v. Sykes, 433 U.S. 72, 79-81 (1977). *See generally* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1 (1990).

haps, something approaching the model that Justice Thomas has advocated—under which a federal court would defer to a prior state court adjudication of the merits that can be said to be "reasonable."[8] As it turns out, however, proponents of that position failed to muster the necessary votes. If we put aside what some of us thought Congress *would* do and to start looking (closely) at what Congress has actually *done*, I think we will find that there is more bark in this dog than bite. The enacted version of this substantive provision is different from versions of the past—different in crucial ways that, if properly understood, retain the federal courts' conventional function.

Fairly read according to its literal terms and the negotiations that produced those terms, § 2254(d) respects a federal court's authority to award habeas relief on the basis of a meritorious claim, notwithstanding a previous state court decision against the prisoner—provided the federal court concludes that the prior state judgment was "contrary to" federal law as "clearly established" by the Supreme Court. A state court decision can be "contrary to" federal law in at least two ways—because the state court invoked an incorrect legal standard or because it applied the correct standard but still reached an erroneous result.[9] Either way, federal habeas corpus relief is available. For § 2254(d) establishes no general rule of deference to "reasonable" state court decisions on questions of federal law or on mixed questions of law and fact. Previous attempts to establish such a rule of deference to the state courts were unsuccessful. Accordingly, proponents made a calculated decision to drop those attempts in order to win passage of a general habeas bill in this Congress. I will explain and defend this thesis in the sections that follow.

Initially, in Parts I and II, I will survey the procedural changes that Pub. L. 104-132 makes in habeas law. That discussion is not only important for its own sake, but also for the context it establishes for approaching § 2254(d). As it turns out, the bulk of the provisions in Pub. L. 104-132 are procedural reforms ostensibly meant to expedite the process by which the federal courts adjudicate claims—particularly in death penalty cases. Those procedural measures would be unintelligible if § 2254(d) undermined the federal courts' authority to determine the merits of claims when they are presented seasonably and in a proper procedural posture. The proponents of Pub. L. 104-132 certainly disclaimed any such pur-

8. *E.g.*, Wright v. West, 505 U.S. 277 (1992) (dictum).

9. *Cf.* 28 U.S.C. § 636(b)(1)(A) (1994) (recognizing that a federal district judge may reconsider pre-trial orders entered by a magistrate judge to determine whether factual findings are "clearly erroneous" and whether legal judgments are "contrary to law").

pose and, by contrast, repeatedly reassured their colleagues that their sights were trained on the procedural shortcomings they perceived in the system.[10]

Beginning in Part III, I will tackle § 2254(d) itself. This new section in Chapter 153 neither withdraws the federal courts' jurisdiction to entertain petitions from state prisoners, nor repudiates the writ's exemption from the full faith and credit statute. It neither saddles habeas corpus with strategic rules borrowed from the law of official immunity, nor confers on the lower federal courts a diluted appellate jurisdiction to review state court decisions for error. By contrast, § 2254(d) fits rather neatly into the structure that has characterized federal habeas adjudication for decades.

In Part IV, I will explain that § 2254(d) displaces the *Teague* doctrine in the main, albeit some of the features of that doctrine are reflected in the new law. In *Teague*, the Supreme Court reacted to the notorious delays that attended habeas litigation under the Habeas Corpus Act as it had existed for decades. Pub. L. 104-132 acknowledges the same problems, but responds in a different way. Rather than adjusting the federal courts' attitude toward prior state judgments to account for delays, the new law attempts forthrightly to move things along. Pub. L. 104-132 thus alters the statutory baseline that *Teague* took as its premise. Remnants of the *Teague* doctrine survive, but primarily only in the conditions that § 2254(d) establishes for its own application in a particular case.

In Part V, I will chart the legislative history behind Pub. L. 104-132 and demonstrate that the statute that emerged this year was the product of three significant compromises—compromises that, in turn, abandoned previous efforts to deprive the federal courts of jurisdiction over habeas petitions from state convicts, to give state court decisions on the merits preclusive effect in federal court, and, finally, to force the federal courts to defer to "reasonable" state court decisions on legal and mixed questions. Finally, in Part VI, I will distinguish arguably analogous lines of authority that might be thought to support a different construction of § 2254(d).

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10. *See infra* notes 52-54, 66, 70, 172-192 and accompanying text.

I. Procedural Provisions: Both Capital and Noncapital Cases

A. *Innovations Regarding the Exhaustion of State Remedies*

Pub. L. 104-132 confirms the general requirement that a prisoner attacking a state conviction or sentence must exhaust state remedies before seeking federal relief.[11] Yet it modifies existing law in two respects. First, the new statute authorizes a federal court to *deny* relief on the merits, despite a prisoner's failure to exhaust state remedies.[12] When, however, a federal court initially thinks a claim is meritorious, the court may not act promptly but must withhold judgment while the prisoner first seeks relief in state court.[13]

Second, Pub. L. 104-132 provides that while a state may waive the exhaustion requirement in any case, a federal court may not infer a waiver from a state's failure to insist on exhaustion. Rather, a waiver can only be found on the basis of an express statement by the authorized state's attorney.[14] This apparently overrules a portion of *Granberry v. Greer*,[15] the Supreme Court decision holding that a federal court may overlook a prisoner's failure to exhaust in cases in which the state does not raise the exhaustion point.

These innovations enhance a state's ability to use the exhaustion doctrine to its advantage. In cases in which a state's attorney is confident that a claim lacks merit and thus is primarily concerned that the claim should be determined quickly, he can simply waive the usual rule that a prisoner must first take the claim to state court. When, however, a state's attorney anticipates that the federal court may find a claim to be meritorious, he may insist that the state courts be consulted—safe in the knowledge that, absent express waiver, a federal court cannot *grant* relief without demanding exhaustion.[16]

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11. 28 U.S.C. § 2254(b)-(c), *as amended.*

12. 28 U.S.C. § 2254(b)(2), *as amended.*

13. Apparently, the point is to conserve resources, but only if the prisoner is due to lose. If it appears that the prisoner has a meritorious claim, Pub. L. 104-132 means that the state courts should be invited to make that judgment.

14. 28 U.S.C. § 2254(b)(3), *as amended.*

15. 481 U.S. 129 (1987).

16. It is fair to say that this contingent arrangement adds to the time required to dispose of a claim in order to protect the state's litigation interests. I have argued elsewhere that arrangements of this kind risk skewing federal judgments on the merits—by encouraging federal courts to find claims to be frivolous in order to dispose of them summarily without triggering the (often time-consuming and arduous) exhaustion of state remedies. Larry W. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 Iowa L. Rev. 609, 635 n.120 (1983).

B. *Filing Deadlines in General*

Pub. L. 104-132 requires a prisoner attacking a state conviction to file in federal court within one year—running from the latest of several events, typically from the conclusion of direct review. The filing period is tolled during any interval when a prisoner is pursuing postconviction relief in state court.[17] The new law does not define "direct review," and that term will have to be interpreted for these purposes (and within the context of each state's appellate system). One key issue is likely to be whether "direct review" includes certiorari proceedings in the Supreme Court.[18]

Filing deadlines of this kind are open to criticism. Aside from the obvious problems,[19] they are in tension with various other rules of federal habeas practice. Consider, for example, that under *Rose v. Lundy*,[20] the exhaustion of state remedies is no longer claim-specific; rather, an entire petition will be dismissed if any of its multiple claims fails the exhaustion test. The idea in *Lundy* is to encourage prisoners to *slow down* litigation of some claims until all are ready for federal adjudication. Yet under this provision in Pub. L. 104-132, a prisoner may be faced with a filing deadline with respect to some claims even though she has not yet completed state

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17. 28 U.S.C. § 2244, *as amended.*

18. It would be sensible, I think, to give "direct review" the meaning the Court gives to "final" judgments—which would include seasonable certiorari proceedings. *See* Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987). Note also that a parallel provision in § 2263 (newly added by Pub. L. 104-132) runs a filing period from "final state court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." *See infra* note 45 and accompanying text. By negative implication, the more general reference here to the conclusion of "direct review" is *not* limited to proceedings in state court, but extends as well to proceedings before the Supreme Court of the United States.

19. Petitioners who are serving prison sentences already have every incentive to file for federal relief as soon as possible. Reliable data indicate that noncapital applicants do file within a year or two and, accordingly, that a strict new filing deadline is unnecessary. Noncapital prisoners typically have no lawyers at this stage and thus will find it difficult to meet a filing deadline.

Proponents insist, of course, that prisoners under sentence of death have an incentive to delay—simply to postpone the final determination of their claims and, accordingly, their ultimate execution. Moreover, death row prisoners are entitled to counsel under current law and thus may be in a position to respond to new incentives for filing early. Nevertheless, the lawyers who represent capital clients at this stage are not the same lawyers who handled earlier proceedings in state court. These new lawyers must be recruited to appear on prisoners' behalf only at this stage. Good lawyers may hesitate to come into complex death penalty litigation if it appears that they must set aside other responsibilities in order to investigate the basis for prisoners' claims, marshal the evidence, and prepare legal arguments and documents in a short space of time. A strict filing deadline will make it even more difficult than it now is to get competent lawyers to assume this critical responsibility.

20. 455 U.S. 509 (1982).

litigation with respect to others.[21]

The new statute also establishes similar filing deadlines for a prisoner attacking a federal conviction or sentence pursuant to 28 U.S.C. § 2255. The delays that have raised concerns in recent years have arisen in cases involving state prisoners in capital cases. Nevertheless, the deadlines in Pub. L. 104-132 cover federal prisoners serving prison terms.[22]

C. *Limits on Federal Evidentiary Hearings*

Pub. L. 104-132 makes significant changes in current law regarding the ability of state prisoners to obtain federal evidentiary hearings in order to develop the facts underlying their claims.[23] Both the previously controlling statute and the Supreme Court's decisions from *Townsend v. Sain*[24] to *Keeney v. Tamayo-Reyes*[25] are affected.

Initially, the new statute confirms the requirement that a federal court must typically presume that a state court's finding of historical fact is correct, as well as the rule that a prisoner can rebut that presumption only by producing "convincing" evidence.[26] Under preexisting law, however, the presumption in favor of a state factual finding was contingent on sound process in state court. The prior statute contained a list of procedural standards that a state proceeding must meet if its results were to have the benefit of the presumption in federal court. Read literally, Pub. L. 104-132 eliminates any federal standards for the fact-finding process in state court and thus ostensibly establishes a presumption in favor of a state finding of fact, without regard for the process from which it was generated. A regime of that kind may, of course, raise serious due process questions—at least in some cases.[27]

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21. Perhaps Pub. L. 104-132 assumes that all claims available to a prisoner can and will proceed through state court in the same way and on the same timetable. That is not necessarily the case.

22. 28 U.S.C. § 2255, *as amended* (allowing one year from the date on which the conviction judgment becomes final—subject to specified tolling provisions).

23. 28 U.S.C. § 2254(e), *as amended.*

24. 372 U.S. 293 (1963).

25. 504 U.S. 1 (1992).

26. 28 U.S.C. § 2254(e), *as amended.* The new law insists that rebuttal evidence must be both "convincing" and "clear," but I doubt that difference is consequential.

27. President Clinton mentioned the constitutional issue this provision might raise in his statement on the day he agreed to Pub. L. 104-132:

> If [§ 2254(e) (as amended)] were read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate federal rights, it would raise serious constitutional questions. I do not read it that way. The provision applies to situations in which 'the applicant has failed to develop the factual basis' of his or her claim.

In addition, Pub. L. 104-132 apparently overrules *Tamayo-Reyes*. In that case, the Supreme Court held that if a prisoner's attorney failed to develop the material facts when given an opportunity to do so in state court, the prisoner could obtain a federal evidentiary hearing to develop those facts if the prisoner showed "cause" for counsel's "default" in state court and "actual prejudice" resulting from the default, or if the prisoner demonstrated that a "fundamental miscarriage of justice" would occur if a federal hearing were not held.[28] In this context, a prisoner could demonstrate such a "miscarriage of justice" by showing that he was probably innocent.[29] The *Tamayo-Reyes* decision itself drew criticism for saddling a prisoner with the mistakes of his lawyer. In any case, the new statute restricts the availability of federal hearings even more.

Under Pub. L. 104-132, a prisoner who failed to develop the facts in state court can obtain a federal hearing only on a showing that: (1) either the claim rests on a "new" rule of law that "the Supreme Court" has made "retroactively applicable to cases on collateral review" or on a "factual predicate" that could not have been discovered previously by "due diligence;" *and* (2)—"the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[30]

Taken literally, the conjunctive "and" preceding this last requirement limits federal evidentiary hearings to prisoners who not only offer a good reason why the facts were not developed in state

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Therefore, [§ 2254(e)(as amended)] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court. Statement of the President, Office of the Press Secretary, April 24, 1996 [hereinafter cited as Signing Statement].

28. 504 U.S. at 11-12.

29. Murray v. Carrier, 477 U.S. 478, 496 (1986).

30. This awkward formulation is evidently meant to incorporate something of the standard that Pub. L. 104-132 uses elsewhere, in 28 U.S.C. § 2244, *as amended*, as part of the test for deciding whether a prisoner can file a second or successive federal habeas petition. *See infra* notes 37-40 and accompanying text. The fit, however, is not good. In that context, the prisoners concerned have had one opportunity to litigate in federal court. That is not necessarily true here—in the case of prisoners seeking evidentiary hearings. I would have thought, accordingly, that the standard here would be less rigid. Inexplicably, it is even more Draconian. Under § 2244(b)(2)(A), a prisoner who wishes to file a second habeas application may do so if her claim rests on a "new" and "retroactive" rule of constitutional law—whether or not the claim is related to innocence in the manner prescribed in the language I have reproduced in the text. Here, by contrast, if a prisoner seeks a federal hearing on the ground that her claim relies on a "new" and "retroactive" rule, the "facts underlying the claim" must go to innocence in this special sense.

court, but also can demonstrate that those facts would have persuaded any "reasonable" judge or jury to acquit the prisoner of the underlying offense. In effect, only prisoners who can make a persuasive showing of factual innocence can obtain a federal evidentiary hearing into facts that may support a constitutional claim. If a prisoner cannot do that, the federal court must proceed on the basis of the state court record, whatever its value—and determine the merits of the prisoner's claim even though some facts underlying the claim are unknown. Here, too, the new law's limits on federal fact-finding will be unconstitutional, I think, at least in some instances.

D. *Limits on Appellate Review*

Pub. L. 104-132 restricts the ability of a prisoner who is unsuccessful at the district court level to appeal to a circuit court of appeals.[31] Under prior law, a prisoner attacking a state conviction could appeal if some federal judge or justice issued a "certificate of probable cause" indicating that at least one of the prisoner's claims warranted appellate consideration.[32] A prisoner attacking a federal conviction or sentence pursuant to 28 U.S.C. § 2255 could appeal without first obtaining such a certificate. The new statute makes three changes in that regime.

First, under Pub. L. 104-132, only a circuit judge or a Supreme Court justice may issue a "certificate of appealability."[33] The district judge who rejected the prisoner's claims at the district level is barred from doing so. The rationale for this change escapes me. A district judge who has just examined a claim on the merits would seem to be in a good position to decide whether appellate review would be worthwhile. A circuit judge or justice must necessarily devote fresh time to a request for a certificate in order to achieve the level of understanding that the district judge already has. It may be that proponents are concerned that district judges now issue certificates without sufficient care, though I know of no data to support that conclusion.[34]

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31. 28 U.S.C. § 2253, *as amended.*

32. For a discussion of the old law, *see* LARRY W. YACKLE, POSTCONVICTION REMEDIES § 160 (1981).

33. The shift of labels from a "certificate of probable cause" to a "certificate of appealability" is probably meant to avoid the "probable cause" terminology—when, under Pub. L. 104-132 (as well as under prior law), the standard is actually whether the prisoner makes a substantial showing of the denial of a federal right. The new statute also contains an amendment to Rule 22 of the Federal Rules of Appellate Procedure, which refers to the issuance of certificates by district judges. But that is almost certainly an oversight.

34. It is also possible that this innovation is meant to reduce the incidence of certifi-

Second, a certificate that is issued must "indicate which specific issue or issues satisfy" the new standard. This, it seems, is meant to restrict appellate review to particular claims thought to merit review and to prevent an appellate court that has accepted an appeal with respect to one claim from considering any other issues in the case. Third, under Pub. L. 104-132, the certificate requirement is extended to prisoners attacking federal convictions and sentences pursuant to § 2255.

E. *Limits on Successive Federal Petitions*

Pub. L. 104-132 establishes rigid new rules that would eliminate most second or successive petitions from a single prisoner.[35] A claim that was presented in a previous federal petition but is offered again in a second or successive petition "shall be dismissed."[36] A claim raised for the first time in a second or successive petition may be considered—but only in narrow circumstances. The prisoner must prove either (1) that the claim rests on a "new" rule of constitutional law that "the Supreme Court" has made "retroactive to cases on collateral review," or (2) that its "factual predicate" could not have been discovered earlier by the exercise of "due diligence" *and* that— "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[37]

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cates—by giving the task of issuing them to judges whose workload will be expanded if they respond positively. The new statute makes no attempt to discourage certificates by establishing a more demanding standard for federal judges to follow. The standard under Pub. L. 104-132 is substantially the same as under prior law: whether the prisoner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2), *as amended. See, e.g.*, Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972), *cited with approval in* Barefoot v. Estelle, 463 U.S. 800 (1983).

35. 28 U.S.C. § 2244(b), *as amended.*

36. 28 U.S.C. § 2244(b)(1), *as amended.* Taken literally, this suggests that a claim must be dismissed even if it was rejected when it was raised in a previous petition only because the prisoner failed to exhaust state remedies. A dismissal for want of exhaustion is not on the merits, but merely postpones federal adjudication. Accordingly, it would be extraordinarily harsh to read this new language to mean that when such a claim is raised again it must be dismissed on the merits.

37. 28 U.S.C. § 2244(b)(2), *as amended.* This is roughly the same standard that Pub. L. 104-132 invokes to frustrate prisoners seeking federal evidentiary hearings. *See supra* note 30 and accompanying text. Arguably, however, this standard is more demanding, inasmuch as, here, there is an express reference to proof of the relevant facts and the court is specifically instructed to view those facts "in light of the evidence as a whole"—presumably the evidence going to guilt or innocence at trial. On the other hand, this standard governs prisoners who have by hypothesis already had one opportunity to be in federal court. The provi-

These standards foreclose any but the most compelling second or successive petition from the same prisoner. Formally at least, the idea presumably is to encourage prisoners to aggregate all their claims in a single petition and thus to discourage multiple trips through the federal courts. Yet the demands made on any prisoner who seeks a second chance are so great that it scarcely seems likely that anyone could actually qualify.

Importantly, these standards are considerably more rigid than the rules now applied by the Supreme Court—which have already significantly diminished the successive-petition phenomenon. The Court, of course, has recently changed the analysis and terminology it uses to deal with second and successive petitions, reconciling the law in this field with the rules and standards used in cases on the effect of procedural default in state court. The standards in Pub. L. 104-132 conflict with those recent decisions.

First, under *McCleskey v. Zant*,[38] a prisoner who can show that she is probably innocent can file a second or successive petition without also showing "cause" for having failed to raise a claim in a prior petition. Under Pub. L. 104-132, however, a prisoner must show *both* something akin to "cause" *and* evidence undermining factual guilt. Second, under *Schlup v. Delo*,[39] a prisoner whose claim goes to the validity of a criminal conviction (as opposed to the validity of a sentence alone) may file a second or successive petition if she offers newly discovered evidence showing that it is more probable than not that no reasonable jury would have voted to convict, if the jury had seen the new evidence. Under Pub. L. 104-132, however, such a prisoner must produce "clear and convincing" new evidence that would have convinced any reasonable jury to acquit. That is the standard the Supreme Court has reserved for claims that go only to the validity of a death sentence.[40]

In addition, Pub. L. 104-132 erects new procedural hurdles for filing second or successive petitions. Under prior law, a prisoner could file another petition so long as it met the standards established by the Court in cases like *McCleskey* and *Schlup*. Under Pub. L. 104-132, by contrast, a prisoner must obtain permission from a three-judge panel of circuit judges—*before* filing a second or successive petition at the district court level. That panel of circuit judges may grant permission only if the prisoner makes a

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sion on hearings undercuts a prisoner's ability to develop the facts underlying claims presented in an initial application for federal relief.

38. 499 U.S. 467 (1991).

39. 115 S. Ct. 851 (1995).

40. Sawyer v. Whitley, 505 U.S. 333 (1992).

prima facie showing that he satisfies the new standards for multiple petitions. Pub. L. 104-132 requires the circuit panel to act on motions for permission to file successive petitions within 30 days and makes the panel's decision final—not subject to review on certiorari.[41]

II. Procedural Provisions: Capital Cases Only

Pub. L. 104-132 contains special optional provisions for death penalty cases only—which can be triggered by a state's willingness to appoint counsel for indigent petitioners at the postconviction stage in state court.[42] These provisions build on structures sug-

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41. 28 U.S.C. § 2244(b)(3), *as amended*. The validity of this apparent attempt to strip the Supreme Court itself of jurisdiction is now before the Court in Felker v. Turpin, *cert. grt'd.*, 116 S. Ct. 1588 (1996). It may be that this particular provision can be saved by construing it to leave intact the Court's jurisdiction to entertain habeas petitions filed as an original matter pursuant to 28 U.S.C. § 2241.

I must say that I find these Byzantine rules and procedures for handling multiple petitions positively bizarre. They will work in one sense. In the end, they will force the dismissal of almost all successive applications for federal relief. But they will not prevent desperate death row prisoners from filing multiple petitions and, certainly, they will not limit the time and resources devoted to habeas litigation. Quite the contrary. They invite even more litigation over whether petitions fit their narrow standards and thus squander the very resources that habeas critics presumably want to conserve.

The new standards are the more puzzling for their inconsistency. Consider the case of a prisoner who wishes to file a second motion under § 2255, attacking a federal criminal conviction. One might have expected that Pub. L. 104-132 would require such a prisoner to meet the same standards that a state prisoner filing a second habeas petition would have to satisfy. The relevant amendment to § 2255 does specify that a second or successive motion must be "certified as provided in section 2244 by a panel of the appropriate court of appeals. . ." 28 U.S.C. § 2255, *as amended*. Yet the circuit panel is not to decide whether the prisoner has made a prima facie showing that he meets the substantive standards precisely as they are set out in § 2244(b)(2). Instead, the panel is to certify whether a second or successive § 2255 motion "contain[s]" either "newly discovered evidence" going to actual innocence or a "new rule of constitutional law, made retroactive" by the Supreme Court.

With respect to the former possibility, this formulation is inexplicable as a matter of policy (poor grammar to one side). It is more generous than the standards applicable to habeas corpus cases controlled by § 2244(b)(2)(B). A state prisoner seeking habeas corpus relief must advance not only evidence going to innocence, but also a good reason why that evidence could not have been discovered earlier. This difference makes little sense.

Recall as well that the standards in § 2244(b)(2) for determining whether a state prisoner can file more than one habeas petition is more generous (in another way) than the standards in § 2254(e)(2) for determining whether a state prisoner can obtain a federal evidentiary hearing respecting an initial habeas application. See note 30 *supra*. Frankly, I suspect that incompetent drafting is responsible for all this confusion.

42. Pub. L. No. 104-132, 110 Stat. 1214, 1221 (1996) (to be codified at 28 U.S.C. § 2261) [hereinafter cited as 28 U.S.C. § 2261]. Three general charges may immediately be laid against this kind of optional structure. First, an optional framework makes everything that follows in the new chapter contingent on a state's voluntary decision. If a state does not choose to cooperate, then all the "reforms" included in the new chapter come to nothing.

gested by the Powell Committee in 1989, but often depart from the Powell Committee's recommendations. The optional features present vexing practical questions, however, and they will generate considerable litigation. Accordingly, it is worthwhile to consider how they are apparently meant to function.[43]

It is far from clear what the states must do to trigger the special provisions in Pub. L. 104-132 for capital cases. The elements of a qualifying scheme for counsel in state postconviction proceedings will have to be worked out in litigation. Unlike other contingent arrangements of this sort, Pub. L. 104-132 establishes no means by which a state can assert that it has created such a mechanism. There is nothing here, for example, calling on the Attorney General or a federal court to appraise what a state has done and to certify compliance. Presumably, some states will take the position that they comply immediately upon the enactment of the new fed-

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Second, a state's compliance with the requirements for triggering the optional chapter must be monitored over time. Presumably, the applicability of the optional chapter's provisions can be opened up and determined in each individual case. How else to ensure that a state that is initially entitled to the advantages of the optional chapter continues to keep its part of the bargain? Third, the optional chapter focuses exclusively on counsel in state postconviction proceedings and fails to address the more serious, persistent problems created by incompetent lawyers who mishandle cases at trial and on appeal in state court. Those are the stages of criminal proceedings at which constitutional claims should be raised and considered in a fair and thorough manner. Yet many states have failed to develop effective systems for providing competent counsel at trial, even in capital cases.

The original bill in the Senate would have repealed the *right* to counsel in capital habeas cases in federal court, 21 U.S.C. § 848(q) (1994), and, instead, would have specified that a federal court may appoint counsel (and approve support services) in its discretion. On the floor, however, Senator Biden persuaded Senator Hatch to accept an amendment that preserves the mandatory character of the counsel statute in death penalty cases. The new statute, then, leaves the right-to-counsel aspects of McFarland v. Scott, 114 S. Ct. 2568 (1994), intact.

Pub. L. 104-132 does contain an important restriction on the ability of counsel to obtain federal funds for support services—e.g., investigators and experts. A "technical" section bars a federal court from considering a request for that kind of funding ex parte, unless counsel makes a "proper showing" of a "need for confidentiality." Critics argue that ex parte proceedings are needed in order to avoid disclosing defense strategies to the prosecution. It remains to be seen what, if any, steps might be open to a federal court concerned that the presence of the state's attorney would compromise counsel's ability properly to represent a prisoner-client.

43. The optional portions of Pub. L. 104-132 are in substance relatively insignificant; most of the important provisions in the new statute are lodged in its general sections and thus are applicable to all cases, capital and noncapital, whether or not a state chooses to invoke the special chapter for death cases. As a practical matter, accordingly, one wonders whether the incentives will be sufficient to persuade many states to assume the costs of providing counsel to indigents for state postconviction proceedings. Fortunately, most death penalty states are beginning to offer counsel in those proceedings voluntarily, albeit the competence of the attorneys provided, and certainly the financial support those attorneys receive, remains to be demonstrated.

eral statute, without the need for any determination or event. That, I am afraid, will not only invite litigation over whether the state's undertakings are sufficient, but will also raise other practical problems—that will, in turn, demand even more litigation to resolve.[44]

Setting to one side these implementation problems, consider the advantages that a state stands to gain in federal court—in exchange for its commitment to provide counsel to indigents in state postconviction proceedings via a qualifying system.

A. *Filing Deadlines*

Pursuant to Pub. L. 104-132, a death row prisoner in a state that has invoked the death penalty chapter must file a federal habeas petition within 180 days after the conclusion of direct review in state court. That six-month period is suspended while the prisoner is seeking certiorari in the Supreme Court (on direct review), while state postconviction proceedings are pending, and for an additional period, not exceeding 30 days, on a showing of "good cause."[45]

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44. Note, for example, that the filing deadlines I will describe in a moment are contingent on a state's status. 28 U.S.C. § 2261. If it is unclear whether a state has done what is necessary to trigger the optional chapter, then it is equally unclear whether a prisoner has the usual year, or just six months, in which to file a federal petition. Coupled with all the other complications touching filing deadlines of any kind, the additional problems this kind of provision will generate can hardly be overstated.

45. Pub. L. No. 104-132, 110 Stat. 1214, 1223 (1996) (to be codified at 28 U.S.C. § 2263). A deadline of this kind will be difficult to satisfy. Most death row prisoners are indigent. While they are entitled to appointed counsel at federal expense pursuant to 21 U.S.C. § 848(q) (1994), they often have no formal way to make contact with lawyers. Many prisoners will not obtain representation until much of the time allotted for filing has elapsed. Some may not find lawyers at all, until it is simply, and jurisdictionally, too late. Of course, the tighter the timetable in any given case, the harder it will be to recruit an attorney ready, willing, and able to spring into action.

In addition, this deadline provision is not properly geared to other, related provisions. This provision specifies that the 180-day time period begins to run when direct review is complete, but it neglects to say when the state must appoint counsel for state postconviction litigation. It appears, then, that a prisoner's time can begin to run and, indeed, can even run out, before the state keeps its part of the bargain. To be sure, the filing period will be tolled as soon as a lawyer is appointed and files a state postconviction action. By then, however, the prisoner will have lost precious time without the professional assistance required to use it.

The Powell Committee report on which these special provisions for capital cases are based, as well as the original "contract" habeas bill in the House, would have run the 180-day filing period from the date that counsel is appointed for state postconviction procedures. The drafters of Pub. L. 104-132 may have overlooked the difficulties that the shift to the date on which direct review is completed creates. The confusion is exacerbated in that § 2265, which accommodates "unitary" systems of review in some states, plainly contem-

B. *Stays of Execution*

The Powell Committee recommended that a death row prisoner should automatically be entitled to a federal stay of execution until the federal courts have disposed of an initial federal petition. If a stay is available without any special showing that a claim has merit, lawyers and judges can be freed from the eleventh-hour emergency litigation that now occurs when a state sets an execution date before the federal courts have had time to consider a prisoner's claims. At first glance, Pub. L. 104-132 appears to incorporate the "automatic stay" idea, borrowing some of the very language the Powell Committee used. On closer examination, however, the new law promptly takes back what it initially offered. For it discontinues any automatic stay as soon as the prisoner files a federal petition—unless the prisoner makes a "substantial showing of the denial of a Federal right."[46] That standard does not appear demanding in the abstract. But its mere existence as a standard means that lawyers and courts will continue to wage emergency litigation over stays of execution—the very stressful and burdensome proceedings that the Powell Committee sought to avoid.[47]

C. *Cognizable Claims*

The optional provisions in Pub. L. 104-132 restrict a federal court to the consideration of claims that have previously been raised and decided on the merits in state court, unless: (1)state authorities prevented the prisoner from presenting a claim to the state courts; (2)the claim rests on a "new" (and retroactively applicable) rule of constitutional law; or (3)the claim's factual predicate could not have been discovered previously by the exercise of due

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plates that the filing period begins only when counsel is appointed.

46. Pub. L. No. 104-132, 110 Stat. 1214, 1222-23 (1996) (to be codified at 28 U.S.C. § 2262). The original "contract" bill in the House included the "automatic stay" provision without this follow-on reservation. The reservation was added by amendment on the floor, however, and became part of H.R. 729. From there, Senators Hatch and Specter picked it up for use in S. 623 and S. 735. Then, it followed the rest of the provisions in S. 735 into Pub. L. 104-132. *See infra* notes 179-182 and accompanying text.

47. Read literally, moreover, § 2262(c) appears to have it that if a district court concludes that the prisoner's claim fails the threshold standard, no other federal court can thereafter issue a stay, unless the additional standards for filing a second or successive petition are met. The Powell Committee plan expressly contemplated that a stay would continue in place through all the usual stages of federal adjudication—the district level, the circuit level, and, of course, the Supreme Court level. This enacted provision, by contrast, appears to cut off appellate review of an initial district court decision. One should think that it therefore raises essentially the same questions that are now before the court in Felker v. Turpin, 116 S. Ct. 1588 (1996).

diligence.[48] These standards roughly reflect some, but not all, the circumstances in which the Supreme Court permits a federal court to consider a claim that was not, but might have been, raised in state court. Conspicuously missing is the Supreme Court's rule that a prisoner need not have a good reason for default in state court, if the prisoner shows that she is probably innocent.[49]

D. *Timetables for Federal Court Action*

Pub. L. 104-132 establishes strict timetables for federal court action on petitions filed by death row prisoners in states that have invoked the optional chapter. Generally, a district court is required to render a decision within 180 days after a petition is filed, and a court of appeals must determine any appeal within 120 days after the reply brief is filed.[50] The new statute allows for extensions, but also creates numerous checks and reporting requirements to ensure compliance with the timetables. The details of those provisions warrant focused attention in cases in which they figure. Suffice it to say that, here again, Pub. L. 104-132 invites substantial litigation—this time over the pace at which the federal courts dispose of claims in death penalty cases.

E. *Accommodation of "Unitary" Systems*

Finally, Pub. L. 104-132 reconciles its optional scheme for capital cases (which assumes a system of state postconviction remedies subsequent to appellate review in state court) with the "unitary" systems adopted in some states (which combine direct appellate review with state postconviction procedures).[51] In this respect, too, litigation will be necessary to sort through the implications of a new federal statute on a state-by-state basis.

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48. Pub. L. No. 104-132, 110 Stat. 1214, 1223 (1996) (to be codified at 28 U.S.C. § 2264) [hereinafter cited as 28 U.S.C. § 2264].

49. *E.g.*, Murray v. Carrier, 477 U.S. 478, 496 (1986). There is no similar provision applicable to cases in states that have not triggered the optional chapter for death penalty cases. That may only mean that Pub. L. 104-132 leaves the Court's ordinary procedural default doctrine as it finds it—in cases not controlled by this special provision. *E.g.*, Coleman v. Thompson, 501 U.S. 722 (1991); Wainwright v. Sykes, 477 U.S. 72 (1977). On the other hand, Tim Ford has suggested the argument that this explicit provision in the optional chapter can be read to abrogate the Court's doctrine in all other instances by negative implication.

50. Pub. L. No. 104-132, 110 Stat. 1214, 1224-1226 (1996) (to be codified at 28 U.S.C. § 2266).

51. Pub. L. No. 104-132, 110 Stat. 1214, 1123-1224 (1996) (to be codified at 28 U.S.C. § 2265).

III. Substantive Provisions

I come now to § 2254(d), which, of course, addresses not the process by which a claim is considered in federal court, but the substance of what the federal courts have authority to do on the merits.

A. *The Basic Habeas Jurisdiction is Unaffected*

At the outset, § 2254(d) clearly acknowledges and reinforces the federal courts' longstanding jurisdiction to entertain habeas petitions from state prisoners and to award habeas relief to prisoners who are found to be in custody in violation of federal law. Nothing in the language of this provision, examined in the context of the other new provisions enacted with it, nor anything in the debates from which this provision emerged, suggests that Congress has altered the basic framework established by Chapter 153 of the Judicial Code. By its explicit terms, § 2254(d) presupposes the basic habeas jurisdiction established by the 1867 Act, now codified in § 2241 and reaffirmed in § 2254(a). Those provisions plainly confer power on the lower federal courts to determine prisoners' federal claims and to award relief when they find a claim meritorious, and nothing in the new § 2254(d) or in any other provision of Pub. L. 104-132 disturbs them in the slightest.

The proponents of Pub. L. 104-132 expressly disclaimed any purpose to touch the habeas jurisdiction. In his opening statement, the floor manager, Senator Hatch, said that his bill would "reform" federal habeas corpus and explained that it would retain the jurisdictional basis under which the federal habeas courts enforce the Fourteenth Amendment.[52] The bill, he said, would "correct some of the deficiencies" in the current scheme—in particular the aspects of current law that Senator Hatch understood to permit "frivolous appeals."[53] In so doing, however, Hatch assured the Senate that the bill would "correct" flaws in the system, "while still preserving and protecting the constitutional rights of those who are accused."[54]

Later, during the floor debates on the bill, the nonjurisdic-

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52. 141 Cong. Rec. S7479 (daily ed. May 25, 1995) (statement of Sen. Hatch).

53. *Id.* It seems plain that in this passage and others like it Senator Hatch used the term "appeals" to include collateral proceedings in federal habeas corpus.

54. *Id.* Introducing the same habeas initiative when it returned from conference, Hatch neglected § 2254(d) entirely and offered three procedural innovations as the bill's principal contributions to habeas reform: filing deadlines, limits on successive petitions, and timetables for federal court action on applications from inmates on death row. 142 Cong. Rec. S3354 (daily ed. April 16, 1996) (statement of Sen. Hatch).

tional character of § 2254(d) was clarified when proponents distinguished it from a competing proposal by Senator Kyl. That amendment was widely understood to have jurisdictional implications of the kind associated with the Tax Injunction Act and the Johnson Act:[55]

> Notwithstanding any other provision of law, an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment or order of a State court shall not be entertained by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention.[56]

The debate was candid. Senator Kyl complimented Senators Specter and Hatch for developing a bill that would make it more difficult for state prisoners to press federal claims in the federal district courts. Kyl complained, however, that the Hatch/Specter bill was deficient in that it would not prevent state prisoners "from going to Federal court" altogether.[57] Kyl was impatient with any plan that would "play with [habeas corpus] around the edges by proposing some time limits and providing for deference to State court proceedings."[58] Under his amendment, by contrast, federal habeas corpus would largely be abolished, and the only federal forum typically open to state prisoners would be appellate review in the Supreme Court of the United States on certiorari from a state court system.[59]

When Senator Biden protested that Kyl's amendment would deny state prisoners even "one shot" in federal court, Senator Kyl gave two responses. Initially, he reminded Biden that his amendment would permit a federal court to hear a prisoner's complaint that the state remedies open to the prisoner were "not adequate or fair."[60] Yet Senator Kyl did not pretend that any such challenge to state procedures would be successful in a serious number of instances. In the main, he offered that it would suffice to retain the

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55. 28 U.S.C. § 1341 (1988); *see* California v. Grace Brethren Church, 457 U.S. 393 (1982) (reading the Tax Injunction Act to limit a federal court's jurisdiction to enjoin the enforcement of state taxes); 28 U.S.C. § 1342 (1988); *see* Mountain States Power Co. v. Pub. Serv. Comm'n of Montana, 299 U.S. 167 (1936) (reading the Johnson Act in a similar way).

56. 141 CONG. REC. S7829 (daily ed. June 7, 1995) (statement of Sen. Kyl).

57. *Id.*

58. *Id.* at S7830.

59. Senator Kyl's explicit statement may have been awkward and inarticulate, but his meaning was unmistakable: "My amendment says: No, a Federal court prisoner adjudicates his claims in Federal court. A State court prisoner adjudicates his claims in the State court. The only time the State court prisoner can go to a Federal court is from an ultimate appeal to the U.S. Supreme Court." *Id.*

60. 141 CONG. REC. S7803 (daily ed. June 7, 1995).

Supreme Court's appellate jurisdiction to review state court judgments for error on certiorari.[61]

Anticipating the charge that the regime he envisioned would be unconstitutional, Senator Kyl insisted that the Supreme Court's decision in *Swain v. Pressley*,[62] sustaining a similar scheme in the District of Columbia, would equally support such a plan for cases involving prisoners convicted in the courts of the various states. In this, he fully recognized and conceded that the consequence of his program would be the practical elimination of federal habeas corpus for state prisoners.[63]

Other Senators fully appreciated this point. Senator Lott, for example, endorsed the Kyl amendment precisely because it would go beyond procedural adjustments and "more deferential standards of review" and would address the "root cause" of "existing problems of delay and abuse by eliminating these habeas corpus reviews of State judgments."[64] Senator Hatch agreed that the Kyl amendment would "effectively end Federal habeas review of State convictions."[65] Senator Specter, for his part, opposed the Kyl amendment because he, too, understood that it would abolish the federal courts' "jurisdiction to entertain questions on Federal issues . . . ."[66]

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61. Once again, Senator Kyl's response to Senator Biden was awkward but clear:

> [T]he Senator from Delaware said he will be proposing an amendment that at least gives the prisoner in the State court system one shot in the Federal courts. . . .
>
> I would like to respond to this in a couple of ways. First of all, we do have one shot in the Federal system under my amendment. It is directly to the U.S. Supreme Court. . . .So if a State court prisoner believes that, despite all of the hearings he has gotten in the State court system, he still has not gotten a fair shake, and that [sic] he has really two things that he can claim—first, the State court system is not fair, and secondly, he can go to the U.S. Supreme Court and make his final point there.

Id.

62. 430 U.S. 372 (1977).

63. I am aware of no cases since *Pressley* in which prisoners convicted in the District of Columbia have been permitted to seek federal habeas corpus relief in an Article III court thereafter.

64. 141 CONG. REC. S7835-01.

65. *Id.*

66. *Id.* at S7834. Both Senator Specter and Senator Hatch voted against the Kyl amendment. *Id.* at S7849. In addition, Senator Hatch had this to say in connection with another amendment by Senator Levin:

> I mention [several cases said to illustrate his point] not because I advocate abolition of Federal habeas corpus. It is clear that we protect it in the Specter-Hatch antiterrorism bill. I am not advocating abolition of Federal habeas corpus. . . . [R]esponsible scholars and lawyers and law enforcement professionals do support banning and getting rid of Federal habeas corpus. There are many bright people who think that this system is out of whack and that we do not need

Given the clarity of the debate, there can be no question that the Senate understood and appreciated the Kyl amendment's jurisdictional implications. Armed with that knowledge, the Senate soundly defeated that amendment by a vote of 61 to 38.[67] The clear import of the debate on, and the defeat of, the Kyl amendment is that senators who wished to circumscribe the federal courts' jurisdiction in habeas corpus found themselves in a decided minority. I have to conclude that the bill that Congress ultimately enacted, including § 2254(d), has no such effect.

B. *Habeas Remains Exempt from Preclusion*

Neither the language nor the history of § 2254(d) suggests that Congress has repealed the exemptions that federal habeas corpus has always had from ordinary preclusion doctrine[68] and from the full faith and credit statute, 28 U.S.C. § 1738.[69] Here again, proponents' repeated endorsements of "postconviction" habeas corpus make it perfectly clear that nothing of the sort is afoot.[70] To the contrary, Congress deliberately rejected the very notion that federal habeas corpus should be governed by a process model, under which a federal court would be restricted to evaluating the adequacy of the procedures employed in state court. After all, if the idea was to compel the federal courts to defer to state court decisions on the merits reached after adequate state process, there would have been no need for a separate provision like § 2254(d). State determinations of legal and mixed questions would simply have been presumed correct along with state findings of primary fact.[71]

Other bills in recent years might well have been construed to introduce some form of preclusion into the habeas context. Both the Reagan and Bush Administrations proposed that the federal courts should be barred from awarding habeas relief with respect to a claim that has been "fully and fairly adjudicated" previously

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Federal habeas corpus. But I am not arguing that position.

> We have provided for protection of Federal habeas corpus, but we do it one time and that is it—unless, of course, they can truly come up with evidence of innocence that could not have been presented at trial.

Id. at S7826.

Returning to the Kyl amendment, Senator Hatch reiterated his view that while Kyl had made a "strong point" that warranted "close scrutiny," he, Hatch, was unmoved: "I have to say that I believe there needs to be postconviction habeas corpus review." *Id.* at S7836.

67. *Id.* at S7849.

68. *See* Smith v. Yeager, 393 U.S. 122, 124-25 (1968).

69. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 (1982).

70. *E.g.*, 141 CONG. REC. S7836 (daily ed. June 7, 1995) (statement of Senator Hatch).

71. 28 U.S.C. § 2254(e), *as amended*. *See supra* note 26 and accompanying text.

in state court.[72] The "full and fair adjudication" standard is, of course, the standard conventionally associated with preclusion doctrine.[73]

The failure of the full-and-fair program provides the backdrop for understanding the bill the 104th Congress has now enacted as Pub. L. 104-132. I will explore that history below.[74] Suffice it to say here that it is far from accidental that § 2254(d) is *not* the old full-and-fair plan. By contrast, this enacted statute was generated for the very purpose of disclaiming the application of preclusion rules to federal habeas.

C. *A Federal Court Must Take Some Account of a Previous State Court Judgment on the Merits*

Obviously, § 2254(d) affects existing habeas law in *some* way. No one would seriously contend otherwise. Just as obviously, however, the change that this provision concededly makes must be reconciled with the body of constitutional, statutory, and judge-made law governing the work of the federal courts in general and federal habeas corpus in particular. The crucial question is the nature and *measure* of the significance § 2254(d) instructs a federal district court to attach to a previous state judgment.

I have tossed this vital problem around with numerous colleagues[75] and, to my mind at least, three possibilities are worth talking about. First, § 2254(d) may accept the conventional framework of federal habeas corpus as it is, but may specify the approach a federal court is to take to a claim when a state court, for its own purposes, has already examined the claim on the merits and found it wanting. Second, § 2254(d) may discard the conventional architecture of habeas corpus and substitute the model associated with the doctrine of official immunity in civil actions for damages pursuant to 42 U.S.C. § 1983. Third, § 2254(d) may transmute habeas corpus into an appellate jurisdiction, lodged in the inferior federal courts, to review state court judgments for error. Let me work each of these through in turn.

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72. *See, e.g.*, S. 2216, 97th Cong., 2d Sess. (1982); H.R. 2709, 101st Cong., 1st Sess. § 605(d) (1989). *See generally* Yackle, *supra* note 16, at 620-628.

73. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 95-105 (1980) (explaining that a federal court is typically precluded from considering a claim previously rejected in state court, unless the state courts failed to provide an opportunity for full and fair adjudication). For a more detailed account of the "full-and-fair" program and its relation to preclusion, *see generally* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993).

74. *See infra* notes 142-171, 179-181 and accompanying text.

75. Most notably, George Kendall and James S. Liebman.

1. *The Conventional Habeas Model.* Under the theory of federal habeas corpus, a district court is exclusively concerned with whether a prisoner is in custody in violation of federal law. The validity of the prisoner's conviction in state court is implicated only incidentally—because the custodian offers that conviction as the explanation for the prisoner's current detention. Certainly, a district court is not charged directly to review the state court conviction for error. And, most certainly, a district court is not entitled to reverse a previous state court judgment and to vacate and remand with instructions—as though the state court were its inferior.

Nevertheless, the availability of federal habeas as a sequel to state court consideration of the same claim does, in the nature of things, place a district court in position to second-guess the state court. In this practical sense, postconviction federal habeas has an undeniable appellate flavor. The great intellectual challenge has always been to reconcile the theoretical (original) nature of the federal courts' jurisdiction to issue the writ on behalf of state prisoners with the practical (appellate) character of the federal courts' function when the state courts have previously adjudicated prisoners' claims.

Pub. L. 104-132 may not nail a resolution of this persistent riddle down at every corner, but it may well contribute to a better and clearer understanding of the federal courts' role within the conventional habeas model. I will elaborate below on the way in which I think the new statute adjusts the federal courts' work within the traditional habeas model. First, however, I want to discuss its competitors in order to demonstrate that, for all its warts, the conventional model still provides the most convincing account of federal habeas corpus.

2. *The Official Immunity Model.* Some observers have it that § 2254(d) transforms the habeas landscape in a radical fashion—by assimilating habeas cases into the model associated with § 1983 actions for damages. Under the decisions governing civil suits of that kind, a plaintiff typically sues an executive officer for violating the plaintiff's federal rights. The defendant typically responds in the alternative—contending, first, that she did not violate the plaintiff's rights at all, and, second, that, if she did, she still enjoys a qualified immunity from suit for damages, because she "reasonably" thought that she was acting consistent with federal law. On a motion for summary judgment, the defendant can avoid a trial if she demonstrates that she behaved in an objectively reasonable way—"assessed in light of the legal rules that were

'clearly established' at the time."[76] The plaintiff need not affirmatively plead that the defendant *did* violate "clearly established" law.[77] As a practical matter, however, such a flagrant departure from federal standards is a necessary element of the plaintiff's ability to put his claim for damages before the jury.

If § 2254(d) builds this model into federal habeas corpus, then this new statute may mean that the elements of a state prisoner's claim for habeas relief have now been changed. Until now, a prisoner was entitled to prevail if her claim was meritorious and nonharmless. Now, an additional element has been introduced: the federal court must conclude that the state court that previously found the claim wanting could not "reasonably" have thought its judgment was correct in light of "clearly established" federal law to the contrary. In effect, by this account, § 2254(d) protects state judges determining federal claims in state court in the way that the law of qualified immunity shields executive officers administering state policies in the field.[78]

It is only fair to say that some of the same language that appears in § 2254(d) can also be found in the qualified immunity precedents. There, too, significance attaches to departures from "clearly established" law.[79] And, obviously enough, some of the same intellectual problems that have arisen in habeas cases have also surfaced in the qualified immunity context. There, too, as in the *Teague* line of decisions, the Court has recognized that evolving legal standards (and the level of generality at which they are defined) can have important implications.[80] However that may be, the Court has never run the two bodies of case law into each other,

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76. Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

77. *See* Gomez v. Toledo, 446 U.S. 635 (1980).

78. I should say in passing that if this *is* the model on which § 2254(d) proceeds, then this new provision should be inapplicable to cases in which it would upset reliance interests in prior law. If a statute significantly changes the elements of a federal claim for relief, or, for that matter, establishes a new defense to such a claim, its application would be retroactive in at least some instances and therefore would run into the conventional rule that statutes presumptively are read not to have retroactive effect. Landgraf v. U.S.I. Film Products, 114 S. Ct. 1483 (1994). This paper is already long enough without taking on the additional burden of assessing the applicability of Pub. L. 104-132's provisions to cases in which the *Landgraf* analysis would be implicated. That burden is heavy; I will leave it to others.

79. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

80. *See, e.g.*, Wright v. West, 505 U.S. 277, 312 (1992) (Souter, J., concurring) (citing Anderson v. Creighton, 483 U.S. 635, 639 (1987)). I will argue below that § 2254(d) abrogates the Court's previous decisions holding that the federal habeas courts cannot enforce "new" rules of law. That adjustment *within* habeas jurisprudence scarcely suggests that § 2254(d) somehow equally abrogates the analytical line *between* habeas and official immunity.

but rather has taken pains to keep them quite apart.[81]

In the immunity cases, the merit of the plaintiff's claim is typically assumed or, perhaps better said, irrelevant. What counts is not whether the defendant acted unconstitutionally, but whether her action, valid or not, was sufficiently egregious to warrant a jury trial and, potentially, an award of compensatory damages. The threat of trials and liability in other than extraordinary circumstances might discourage competent people from accepting executive positions or, having done so, from discharging their duties aggressively. Moreover, if executive officers could be routinely forced to defend themselves at trial, "society as a whole" would have to bear "the expenses of litigation" and "the diversion of official energy from pressing public issues . . . ."[82]

That is what the immunity cases are about. "[T]he inquiry into clearly established law as it pertains to qualified immunity" is logically and practically limited to cases in which public officials are faced with the "specter of damages liability for judgment calls made in a legally uncertain environment."[83] It is to deal with problems of that kind that the Court has created a "well-established, independent rule of law"[84] requiring plaintiffs in civil damages actions to demonstrate, at the threshold of litigation, that their allegations, if proved, reveal an extraordinarily flagrant violation of federal rights—of a nature that no responsible officer, operating in good faith, could countenance.

None of those considerations obtains in habeas corpus proceedings—as traditionally and conventionally understood. State judges are not put on trial. Nor are they exposed to personal liability for their judicial decisions. Within the conventional habeas corpus framework, state judges are not even formally involved. The dispute with which the federal district court is concerned is between the petitioner and the custodian, who defends the prisoner's detention on the basis of what state judges have done and thus places their work under examination only indirectly.[85] In that pos-

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81. Different considerations drive these two doctrines. In habeas corpus, the Court has attended to "certain special concerns" touching the availability of collateral relief from state judgments and, in so doing, has fashioned the *Teague* doctrine to strike the proper balance. Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745, 1751 (1995). In the qualified immunity cases, the Court has addressed equally "special," but plainly different, "federal policy concerns" relating to civil suits for damages. *Id. See* Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991).

82. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

83. Ryder v. United States, 115 S. Ct. 2031, 2037 (1995).

84. Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745, 1751 (1995).

85. *See* Coleman v. Thompson, 501 U.S. 722, 730 (1991).

ture, there surely is even less reason for invoking qualified immunity doctrine to shield state judicial judgments from (deflected) federal examination than there would be for invoking that doctrine to insulate any other ordinary, though perhaps defective, judicial decision from any kind of appraisal.[86] It simply makes no sense to think that § 2254(d) immunizes state judges from nonexistent liability for reaching erroneous constitutional decisions.

If this is not enough to defeat the official immunity model for use in habeas corpus, consider all the precedents already on the books in which the Supreme Court has labored long and hard to make these two different kinds of actions compatible. In *Heck v. Humphrey*,[87] for example, the Court recently held that a § 1983 suit for damages is unavailable to a plaintiff whose claim goes to the validity of a criminal judgment—unless the plaintiff first manages to undermine that judgment in a habeas corpus action or by some other means. The scenario the Court envisions is that a plaintiff will initially seek and obtain a favorable decision in habeas (in which case qualified immunity will play no role). Then (and only then), the plaintiff will be entitled to sue the offending state executive officer for damages (in which case that officer *will* be entitled to defend on the basis of immunity). If by virtue of § 2254(d), a plaintiff must, in effect, meet the qualified immunity standard in pursuing habeas relief, *Heck* would become unintelligible. An issue the Court has deliberately reserved for the subsequent § 1983 action would be jammed into the previous habeas action—making the § 1983 action's treatment of it redundant or, if you like, superfluous.

Finally, there is not a stitch of evidence that anyone in Congress proceeded with the immunity cases in view. Senator Hatch did refer to *Harlow v. Fitzgerald*[88] on one occasion, but only when he was illustrating that the Supreme Court has employed a "reasonableness" standard in other contexts.[89] That, indeed, would have been the perfect occasion for Hatch to explain that his bill would incorporate the immunity model into habeas. He said no

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86. *Cf.* Ryder v. United States, 115 S. Ct. 2031, 2037 (1995) (adopting precisely this reasoning in rejecting an argument that a judgment rendered by unqualified military judges might be sustained by analogy to the qualified immunity cases). If there is any analogy at all between habeas corpus and § 1983 cases, it is not between habeas and civil actions for damages (where qualified immunity operates), but rather between habeas and civil actions for injunctive relief (where qualified immunity is unavailable). *See* Pulliam v. Allen, 466 U.S. 522 (1984) (rejecting a state magistrate's assertion of immunity from a suit for an injunction).

87. 114 U.S. 2364 (1994).

88. 457 U.S. 800 (1982).

89. 141 CONG. REC. S7848 (daily ed. June 7, 1995) (statement of Sen. Hatch).

such thing, but rather promptly resumed his argument that habeas reform was needed to eliminate "frivolous appeal after frivolous appeal"—particularly in death penalty cases.[90] Certainly, Hatch did not mention *Heck* or any other § 1983 case that would necessarily be affected by any turn to the immunity model. In the end, § 2254(d) simply cannot be read as an ill-conceived attempt to borrow wholesale from another body of federal law, the features of which defy any such effort.

3. *The Appellate Model.* Alternatively, § 2254(d) may mark a different, but equally radical departure from the conventional habeas corpus model. It is open to argue that this provision confers on the inferior federal courts an entirely new appellate jurisdiction to review state court decisions for error. Into the bargain, § 2254(d) may mean that in the exercise of this new appellate jurisdiction the federal courts are not to employ independent judgment on the merits of legal issues and mixed questions of law and fact, but must, instead, give effect to previous judgments reached in state court. I have to say, however, that any attempt to read § 2254(d) this way faces monumental hurdles.

Once again, § 2254(d) is plainly premised on the common understanding that a habeas corpus petition initiates an original, quasi-civil action in federal court. Nothing in this new provision purports to repeal or affect in any way the basic habeas jurisdiction, established by § 2241 and § 2254(a). In the exercise of the power conferred by those statutes, a federal habeas court clearly must take serious account of a previous state judgment. But the federal court does not assume a hierarchal power routinely to superintend the work of the state courts as though they were inferior tribunals within the federal system.[91]

Nor is there any explicit language in § 2254(d) purporting to establish a new appellate jurisdiction in the federal district courts. And small wonder. In two hundred years of American constitutional history, Congress has never once thought it necessary or appropriate that the inferior federal courts should sit in judgment of their state counterparts. Scarcely any aspect of federal courts jurisprudence is more well settled and familiar than the proposition that the district courts' jurisdiction is, and has always been, "strictly original."[92] A departure from this pivotal principle would

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90. *Id.* Senator Hatch read almost precisely this same speech, mentioning *Harlow* in the same way, when he later defended the habeas bill after it returned to the Senate from conference. 142 CONG. REC. S3446 (daily ed. April 17, 1996) (statement of Sen. Hatch).

91. *See supra* text following note 75.

92. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923).

have implications for federal-state relations on a fantastic scale. For the essentials of the American judicial system are anchored in it: the bedrock understanding that "we have. . .in this country two essentially separate legal systems;"[93] the equally basic understanding that the federal and state courts proceed "independently" with "ultimate review" of their judgments in the Supreme Court alone;[94] and the corollary understanding that the state courts are under no obligation to follow inferior federal court decisions as though they were authoritative.[95] One can only imagine the passions that would have been stirred if anyone had thought for a moment that this obscure provision would, for the first time, subject the state courts to the direct appellate supervision of federal trial-level courts.[96]

Subjecting state supreme court judgments to appellate review in the federal district courts would not only constitute a startling deviation from custom. It would raise the most serious constitutional questions. To be sure, Alexander Hamilton's Federalist No. 82 supports congressional power to confer such a jurisdiction. But the Supreme Court has never had occasion to address the argu-

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93. Atlantic Coast Line R.R. v. Bd. of Locomotive Eng'rs, 398 U.S. 281, 286 (1970).

94. *Id.*

95. Lockhart v. Fretwell, 505 U.S. 364, 376 (1993) (Thomas, J., concurring). *See generally*, Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (citing other precedents).

96. If anyone *was* thinking in these terms, then certainly previous proposals to establish such an appellate jurisdiction (at the circuit level) would have been recalled and considered. *E.g.*, Daniel J. Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273 (1983); James Duke Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U. L. REV. 545. Nowhere in the materials touching § 2254(d) were those proposals so much as mentioned.

It is true that some participants in the floor debates referred to § 2254(d) as establishing a "standard of review." It may well be that in using that phrase they thought they were discussing federal court "review" of state judgments in the ordinary, appellate sense. Yet it is hardly necessary to infer from the misstatements or misconceptions of individual members that the product Congress ultimately produced worked such a fundamental restructuring of federal-state relations. Rather, I think those references on the floor to federal "review" are consistent with the understanding of § 2254(d) that I am defending—which has it that this new provision focuses federal habeas adjudication on any prior adjudication of the merits that has occurred in state court.

This, by the way, is what the Supreme Court probably meant in Wright v. West, 505 U.S. 277 (1992), when the Court referred to a federal habeas court's responsibility to "review [a] state court's determination" of the merits of a claim "*de novo*." It is also what the President must have meant in his signing statement. Signing Statement, *supra* note 27 (referring to "death row *appeals*" and "independent *review* of federal legal claims" but disclaiming the view that § 2254(d) limits "the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact that come before them on habeas corpus") (emphasis added).

ments arrayed against Hamilton's view. Those arguments are powerful. Article III refers explicitly to appellate jurisdiction only with respect to the "one" Supreme Court whose creation is constitutionally mandated. That one Supreme Court, in turn, is widely understood to have been given appellate jurisdiction over state court judgments by virtue of the "Madisonian Compromise," pursuant to which anti-federalists withdrew their opposition to such a jurisdiction in exchange for a commitment to leave the creation of inferior federal courts to the new Congress.[97] Even then, the Supreme Court's power to review state judgments for error remained controversial and was finally settled only after protracted litigation.[98] Against this background, it would be no small matter for Congress to attempt to subject state decisions to review in the inferior federal courts and thus to reopen an old (and vexing) question of federal judicial power.[99]

If it is difficult to justify granting the district courts jurisdiction to review state court judgments, it is ever so much more difficult to justify granting them such a jurisdiction, but then withholding from them the authority to determine claims according to their own, independent judgment. Indeed, if that is what § 2254(d) means, then this new statute may well be invalid. For Congress cannot constitutionally condition the decision that an Article III court can reach with respect to a legal question (and certainly a question of constitutional law), or a mixed question of law and fact, without invading the independence of the judicial branch. "It is," after all, "the province and duty of the judicial department to say what the law is."[100]

Congress has considerable power to fix the federal courts' jurisdiction in the first instance.[101] And Congress can affect the results in cases by changing the law the federal courts are to apply.[102]

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97. PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 10-11 (3d ed. 1988).

98. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

99. The establishment of appellate jurisdiction in the district courts would also revive the constitutional arguments raised against the creation of a national court of appeals to relieve the Supreme Court of part of its appellate work. *E.g.*, Charles Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974). District court judgments would presumably themselves be subject to appellate review and thus would not purport to resolve federal questions for the entire country. Yet situating the inferior federal courts between the state courts and the Supreme Court would obviously affect the latter's appellate functions in ways that would be constitutionally significant.

100. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see* Signing Statement, *supra* note 27 (making this point).

101. *See* Sheldin v. Sill, 49 U.S. (8 How.) 441 (1850).

102. *See, e.g.*, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992). *Accord* United States v. Sioux Nation of Indians, 448 U.S. 371, 431 (1980)(Rehnquist, J., dissenting); Gray

But Congress cannot confer jurisdiction on an Article III court, leave the substantive law unchanged, and still presume to tell the court what judgment to render on the merits.[103] No one has seriously endorsed any such congressional overreaching for generations, and certainly not since Professor Henry Hart's classic statement on the point.[104] Only last Term, the Supreme Court reiterated that Congress has no power to assign "rubber-stamp work" to an Article III court.[105]

If, indeed, this is the kind of appellate jurisdiction § 2254(d) means to establish, it doubly disrupts the settled federal order of things. For it neither accords to the state courts the respect that is their due, nor assigns to the federal district courts the full judicial power they are given Article III authority to exercise. Each, instead, gets half a loaf.

On the one hand, a state court is denied the authority to operate as a court in the ordinary course—authoritative with respect to local law, able to determine questions of federal law, but, as to the latter, necessarily subject to appellate review *de novo*. The state court is not entitled to be judged straightforwardly on whether it has arrived at a correct judgment on a federal constitutional question. Rather, it is subject to a shadow set of standards and may

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v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993).

103. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). *Cf.* Plaut v. Spendthrift Farm, 115 S. Ct. 1447, 1455 (1995) (reaffirming Hamilton's admonition in Federalist No. 78 that "[t]he interpretation of the laws" is "the proper and peculiar province of the courts").

104. Said Hart:

> It's hard, for me at least, to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court (outside the original jurisdiction of the Supreme Court), if Congress chooses to provide some alternative procedure. . . .
>
> On the other hand, if Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it. . . .That's the reason, isn't it, why [Chief Justice] Hughes invokes Article III as well as the Fifth Amendment in *Crowell v. Benson*? As he says, the case was one "where the question concerns the proper exercise of the judicial power in enforcing constitutional limitations."

BATOR, *supra* note 97, at 400.

105. Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2234 (1995): "Congress may be free to establish a. . .scheme that operates without court participation. . . .But that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate."

In *Gutierrez*, the Court was concerned with a statutory framework in which an initial decision was assigned to a federal executive officer. Yet there is no reason to think that the same constitutional difficulty would not attend an attempt to assign a preliminary decision to a state court and then to call on a federal court to "rubber-stamp" that decision, without an independent evaluation. Here, moreover, as in *Gutierrez*, the constitutional violation would be exacerbated in that § 2254(d), like the statute in *Gutierrez*, makes no explicit provision even for a federal examination of the process by which the state court reached the outcome it did.

find its decisions upset (in effect) for being *unacceptably* wrong—as determined by a federal district court. One suspects that most state courts would rather be told they have made an incorrect decision than that their failings have been indulged by a federal court prepared to act only if they commit egregious error.

A federal court, on the other hand, is also denied the ability to proceed in the ordinary, traditional way—deciding whether the federal claims that come before it are meritorious and awarding relief when it is called for. Instead, a federal district court that is convinced that a prisoner is in custody in violation of the Constitution can act only finds if it first decides (presumptuously) that a state court that previously adjudicated a claim shot so wide of the mark that its judgment must be considered unreasonable. This is not a role that Article III contemplates for any federal court.[106]

IV. The Conventional Habeas Model

The problems raised by the official immunity and appellate review models are insurmountable. Those interpretations of § 2254(d) cannot be reconciled with other provisions in Chapter 153, either the provisions that were there previously or the new provisions added by Pub. L. 104-132. Nor can they be reconciled with the larger body of federal courts law within which § 2254(d) must function. If either of those models were accepted, then this single obscure new provision in the habeas corpus statutes would require massive reformulations of well settled arrangements in adjacent fields. This being so, it only makes sense to ask whether there is a more modest, more sensible, construction to be placed on § 2254(d). There is such a construction; it fairly stares out at us from the page.

The language, context, and history of § 2254(d) bring it comfortably within the conventional habeas corpus framework. Habeas is an extraordinary remedy and is not to be used routinely to "relitigate state trials."[107] Since a federal habeas court has no appellate jurisdiction to superintend the state courts directly, it follows that a federal district court is in no position to reverse a state court

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106. At the very least, then, Article III questions can and should be avoided by interpreting § 2254(d) to leave the federal judiciary free to exercise independent judgment on federal questions. For "it is a cardinal principle" that if it is "fairly possible" to construe a statute affecting federal court jurisdiction to avoid a constitutional question, then the statute should be interpreted in that way. Johnson v. Robinson, 415 U.S. 361, 366-67 (1974). *Cf.* United States v. X-Citement Video, 115 S. Ct. 464, 470 (1994) (confirming that courts will not "impute to Congress an attempt to pass legislation that is inconsistent with the Constitution as construed by [the Supreme Court]").

107. Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

judgment it finds erroneous. By contrast, a federal court is duty-bound to accord a prior state court judgment all due attention and respect.

The difficulty the proponents of § 2254(d) perceived in the modern habeas system is that the peculiar "*de novo*" standard for federal habeas adjudication, usually associated with *Brown v. Allen*,[108] had developed into something quite different from the ordinary "*de novo*" standard as it exists in appellate review cases. In the context of appellate review, "*de novo*" review is understood to mean that an appellate court will focus its attention on the action taken below and then exercise independent judgment on whether that action was correct.[109] In the habeas corpus context, by contrast, the "*de novo*" standard had taken on a different meaning: that a federal court could and should ignore a previous state court judgment on the merits—as though it didn't exist.

In the minds of the critics pressing for change, that state of affairs misapprehended the implications of the baseline premise that the federal courts have no appellate jurisdiction over state court judgments. The absence of appellate jurisdiction implies that a federal court should accord a state judgment all due respect and should be properly convinced that a prisoner's claim is meritorious before rejecting a state court's judgment as a sufficient basis for the prisoner's custody. Yet the "*de novo*" standard that had developed in habeas drew virtually the opposite inference. The absence of a federal appellate jurisdiction to oversee the state courts allowed, or even required, a federal habeas court to ignore a prior state court judgment entirely.

In fact, of course, even habeas proponents would acknowledge that a prior state court adjudication represents the best available judicial thinking about the very question before the federal court. That would be true if the federal district court were reviewing the state decision in an appellate fashion; it is equally true when a federal district court operates within the habeas corpus model. This new provision in Pub. L. 104-132, accordingly, insists that a federal court entertaining a claim that was previously adjudicated in state court must take that prior adjudication as a starting point—just as would the district court if it were reviewing the state court's work on appeal or, if you like, just as would the Supreme Court if it were reviewing the state decision on certiorari. Still, the federal habeas court must itself exercise independent judgment. Yet the focus of that independent federal judgment is not the merits of the

108. 344 U.S. 443, 458 (1953).

109. *See* First Options of Chicago v. Kaplan, 115 S. Ct. 1920, 1926 (1995).

claim in the air, but rather the accuracy of the prior state court decision on the merits.

This difference *is* one of focus, to be sure, but it is an important difference of focus that delineates the federal court's function. In constitutional adjudication, as in life generally, it makes a good deal of practical difference whether a decision-maker shoulders initial responsibility for addressing and resolving a question or, instead, limits his judgment to whether a previous decision-maker reached the correct result. It is that psychological effect that § 2254(d) attempts to achieve.[110]

Let me underscore that by directing the federal habeas courts to address state decisions explicitly, § 2254(d) does not transmute habeas into an ordinary appellate jurisdiction. I have just sketched the reasons why that interpretation will not do. This new provision only borrows from the appellate model one crucial feature—the "*de novo*" standard as it is customarily understood: i.e., independent judgment on the accuracy of a previous decision on the merits. By assimilating this orthodox meaning for "*de novo*" adjudication into habeas, § 2254(d) embraces the aspect of the appellate model that most respects the integrity and competence of the state courts—and concomitantly rejects other hierarchical baggage that attends the appellate model in its own field.

Under this new statute, as in the past, state court judgments are subject to direct review (and possible reversal) only by the Supreme Court itself. Under this new statute, as in the past, state courts are compelled to accept as authoritative only the Supreme Court's own elaboration of federal law (not the decisions of inferior federal tribunals). Under this new statute, as in the past, both federal and state courts exercise independent judgment on the merits of federal claims. Under this new statute, however, a federal habeas court focuses its independent consideration of the merits in a distinct fashion: by asking whether a previous state court judgment was erroneous.

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110. There is a functional analogy between the framework that § 2254(d) establishes for a federal habeas court examining legal claims previously adjudicated by a state court and the framework that 28 U.S.C. § 636(b)(1) establishes for a federal district court examining matters previously determined by a magistrate judge. The district court need not hear anew the evidence that was before the magistrate and, in that way, relitigate what the magistrate has already adjudicated. But the district court is certainly charged to make its own "de novo determination" regarding the findings and recommendations reached and offered by the magistrate judge. Otherwise, the scheme by which magistrate judges conduct suppression hearings would almost certainly be unconstitutional. *See* United States v. Raddatz, 447 U.S. 667, 674 (1980).

A. *Section 2254(d) and* Teague v. Lane

If § 2254(d) is to function within the existing habeas environment, this new statute must attend to the Supreme Court's decision in *Teague v. Lane* and related cases. The groundwork here is familiar. In cases arising on direct review, the Supreme Court held in *Griffith v. Kentucky*,[111] that it is constitutionally essential to invoke the principles of federal law that prevail at the time of appellate decision. This is true even if the Court chooses a particular case as the occasion for announcing a "new" rule of constitutional law. When that happens, the "new" rule is fully applicable to the case at bar, as well as to any other case that has not yet reached final disposition on direct review. In cases arising on writ of habeas corpus, by contrast, the Court held in *Teague* that the Habeas Corpus Act (as it then existed) should be read to bar the announcement or enforcement of a "new" rule, except in exceptional circumstances.[112]

Subsequently, all the action in the *Teague* doctrine has arisen with respect to the definition of what counts as a "new" rule. In that regard, the Court has said two things of primary significance here. First, a federal habeas court is typically barred from applying an innovative legal standard established by a precedent handed down after a prisoner's case left state court. A legal standard is sufficiently "new" for these purposes if previous precedents cannot fairly be cited in support of it and the rule, accordingly, depends on the more recent decision.[113] Second, a federal habeas court is also typically barred from applying a settled legal standard in a "novel setting," so that the reasoning undergirding the rule is "extended."[114] If, accordingly, a state court entertaining a prisoner's claim would not have felt "compelled" by then-existing precedents to find his claim meritorious, then a federal habeas court cannot do so without establishing a "new" rule of law.[115]

The first of these propositions is comparatively modest and has raised few concerns, even in the circles in which I move. The

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111. 479 U.S. 314 (1979).

112. Those exceptional circumstances were two: (1) where a "new" rule placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;" and (2) where the "new" rule inaugurated "new procedures without which the likelihood of an accurate conviction [would be] seriously diminished." *Teague*, 489 U.S. at 311, 313.

113. *E.g.*, Sawyer v. Smith, 497 U.S. 227 (1990).

114. Stringer v. Black, 503 U.S. 222, 228 (1992). *E.g.*, Graham v. Collins, 506 U.S. 461 (1993); Saffle v. Parks, 494 U.S. 484 (1990).

115. *Saffle*, 494 U.S. at 488.

second has evoked genuine alarm in the academic community.[116] It is that proposition on which Justice Thomas bases his argument that the federal courts may routinely defer to "reasonable" state court judgments on "mixed" questions of law and fact.[117] Justice Thomas acknowledges that his position has nothing to do with keeping the federal habeas courts from surprising the state courts by invoking rules of law that are genuinely "new." He insists, however, that the Court's definition of "new" rules in this context effectively revisits the older question whether a federal habeas court can and should exercise independent judgment on the merits of a federal claim. Of course, it is because its definition of "new" rules lends itself to that very enterprise that the *Teague* doctrine has come under sharp attack.[118]

There is no denying that § 2254(d) captures something like the descriptions of "new" rules that appear in the *Teague* cases. The statute generally disallows federal habeas relief when a prior state court judgment is in place, but it suspends that prohibition in two instances: when the previous state judgment was either "contrary to. . .clearly established Federal law" or "involved an unreasonable application of" clearly established law. Certainly the reference to "clearly established" federal law implies that federal habeas is not typically to be a vehicle for advancing the development of federal rights. Some observers may well read the new statute simply to codify the *Teague* doctrine; some, I dare say, will read it to endorse Justice Thomas' twist on *Teague*.

The ostensible similarities between *Teague* and § 2254(d) being conceded, however, the only thing that follows for sure is that the two cannot function in tandem. This is to say, the new statute cannot take the *Teague* doctrine as it finds it and simply establish other questions for a federal court to answer after the court is satisfied that *Teague*, for its part, allows the court to award relief.

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116. *See* Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371 (1991); Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on* Teague v. Lane, 66 So. CALIF. L. REV. 2453 (1993); Vivian Berger, *Justice Delayed or Justice Denied—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992); James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91). *See also* Yackle, *supra* note 73 at 2385-99.

117. Wright v. West, 505 U.S. 277 (1992).

118. See Yackle, *supra* note 73. On the wider (and widely unfortunate) jurisprudential implications, *see* Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 (1992); Richard Fallon & Daniel Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

The questions that *Teague* and the statute contemplate overlap too much to make any such seriatim analysis a sensible exercise.

The different question whether the statute codifies the *Teague* doctrine is more difficult. On examination, the answer must be negative. The fact is that § 2254(d) does not incorporate the Supreme Court's *Teague* doctrine in so many words, despite available illustrations of how that might be done.[119] Moreover, § 2254(d) does not mention the exceptions the Court has recognized to *Teague's* general prohibition on the enforcement of "new" rules in habeas.[120] It just won't do, then, to read this statute simply to incorporate *Teague* and its progeny, such that the statutory language can be ignored and future cases can be handled as further elaborations of judge-made decisional law.[121] It is accurate only to say that

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119. *E.g.*, Caspari v. Bohlen, 114 S. Ct. 948, 953 (1994).

120. *See* Teague v. Lane, 489 U.S. 288, 313 (1989).

121. Statutes do occasionally embrace a body of case law wholesale. Congress, after all, codified the "exhaustion doctrine" nearly fifty years ago. In that instance, however, an accompanying committee report was clear on the point: "This section is declaratory of existing law as affirmed by the Supreme Court." H.R. REP. No. 308, 80th Cong., 1st Sess. A180 (1947). Here, there is no such statement in any authoritative legislative source to the effect that § 2254(d) equally codifies *Teague*.

Other provisions in Pub. L. 104-132 put one in mind of the *Teague* exceptions. For example, § 2244(b)(2)(A)(as amended) allows a prisoner to excuse a failure to raise a claim in a prior federal petition in part on the ground that the claim depends on a "new" rule that was "previously unavailable" but has been made "retroactive to cases on collateral review." *See also* 28 U.S.C. § 2244(d)(1)(C), *as amended* (employing a similar test with respect to filing deadlines); 28 U.S.C. § 2254(e)(2)(A)(i), *as amended* (using the same test with respect to the development of facts in prior state proceedings); 28 U.S.C. § 2255, *as amended* (incorporating the same standard with respect to the filing deadlines for § 2255 motions and also with respect to the acceptability of second or successive § 2255 motions); 28 U.S.C. § 2264 (employing the same test with respect to the acceptability of claims that were not raised and decided on the merits in state court).

On first blush, one might take those references as evidence that § 2254(d) codifies *Teague* bag and baggage—so that it is necessary to acknowledge that a prisoner who fits one of *Teague's* exceptions is exempted from the general prohibition on the application of "new" rules. But if § 2254(d) embraces *Teague* complete with its exceptions, I would expect the exceptions to be mentioned in § 2254(d) itself—so that it is clear that the exceptions are available to a prisoner filing her first federal petition, irrespective of whether she has met the filing deadline or developed the claim and its supporting facts in state court.

By placing these references to "new," but "retroactive," rules in the sections where they appear, Pub. L. 104-132 suggests something entirely different. Those references are not to "new" rules that are available in habeas because of *Teague's* exceptions, but rather to "new" rules that are available to any litigant simply because the Supreme Court has announced them. It is significant, I think, that all the extra-§ 2254(d) references to "new" rules in Pub. L. 104-132 are limited to rules the Supreme Court itself has made retroactively applicable. Under the *Teague* doctrine, the lower federal courts, too, participate in the making of "new" and retroactively applicable law—so long as the innovations they establish fit into one of the exceptions. The Supreme Court itself must be involved only if "new" rules are established outside the *Teague* exceptions. *Cf.* Griffith v. Kentucky, 479 U.S. 314 (1987)

Congress has legislated in the field in which *Teague* has operated and has thus reformulated the way in which the federal habeas courts are to deal with the question that *Teague* previously answered—that is, the effect of a prior state court judgment on the merits.

Think of it this way. Viewing the habeas statutes as they were prior to Pub. L. 104-132, the Supreme Court understood that the

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(holding that when the Supreme Court announces a novel principle on direct review the principle is applicable retrospectively to all litigants still in the appellate pipeline).

This reading, too, faces a textual difficulty. All but one of the extra-§ 2254(d) references to "new" rules contemplate that the Supreme Court has made such a "new" rule retroactively applicable "to cases on collateral review." *E.g.*, 28 U.S.C. § 2244(b)(2)(A), *as amended*. Under the *Griffith/Teague* regime, the Court (any court) would have occasion to decide that a "new" rule is applicable to "collateral review" cases only in a case that is itself in the collateral posture—i.e., only in a habeas action in which the question is whether the "new" rule fits within one of *Teague's* exceptions. By dint of *Griffith*, the question of retroactive applicability would not even arise in a case on direct review of a state court judgment: anything the Court might say in that posture would automatically have retrospective effect, albeit only to cases still subject to direct appellate review. There is, then, a fair argument that these extra-§ 2254(d) references to "new" rules do somehow reflect *Teague's* exceptions.

At the very most, however, this last argument proves only that Pub. L. 104-132 is ambiguous in this respect (as it is in so many others). References to the Supreme Court point in one direction, while references to rules made applicable "to cases on collateral review" point in the other. The competing interpretations, however, are scarcely weighted equally. Any argument that § 2254(d) simply codifies *Teague* faces all the other difficulties I have sketched in the text. Moreover, at least one extra-§ 2254(d) reference to "new" rules in Pub. L. 104-132, § 2264, has it that the Supreme Court may simply recognize "a new Federal right that is made retroactively applicable"—period. That provision, for one, does not appear to contemplate *Teague's* exceptions, but, instead, is perfectly, and textually, consistent with the understanding that a federal habeas court can now give effect to a "new" rule of law, announced by the Supreme Court in any setting and at any time.

When, accordingly, the sections of Pub. L. 104-132 on successive petitions, filing deadlines, fact-finding, § 2255 motions, and procedural default refer to "new" rules of law, I conclude they mean the ordinary evolution of constitutional law in the Supreme Court. By this account, two things are true. First, the *Teague* doctrine has been superseded; *Griffith* is no longer restricted to the direct review context. Second, § 2254(d) now occupies this field of play and controls the effect of prior state court judgments in federal habeas; that effect no longer turns on whether the prisoner's claim depends on a "new" rule of constitutional law.

I have found nothing in the legislative history that throws serious light on the relationship between § 2254(d) and *Teague*. I do think, however, that Senator Hatch's introduction of the bill to his colleagues is consistent with the view I am defending:

> There will be a full right of appeal all the way up the State courts, from the lowest court to the Supreme Court of the State. There will be a full right of appeal all the way up the Federal courts, from the Federal. . .district court to the Supreme Court of the United States. . . .But that is all [prisoners] are going to have, unless they can show newly discovered evidence of innocence *or unless the Supreme Court applies retroactively future cases to these problems.*

141 CONG. REC. S7481 (daily ed. May 25, 1995) (statement of Sen. Hatch) (emphasis added).

point of federal habeas corpus was to deter the state courts from disregarding controlling principles of federal law. Under the habeas statutes as they then stood, years could pass between state and federal adjudications of a prisoner's case. During that time, federal law could change—in the prisoner's favor. Yet in the Court's view the deterrent purpose of habeas was not served by granting federal relief on the basis of a "new" rule of federal law, which, by hypothesis, the state court reasonably failed to recognize at the time it acted. In *Teague v. Lane*, accordingly, the Court held that, except in rare circumstances, the federal courts should decline to enforce "new" rules in habeas. That way, the federal courts could respect state attempts to comply with federal law established at the time of state court decision, and the federal courts would not surprise the states by awarding relief on the basis of an interpretation of the Constitution that had not prevailed earlier.

Pub. L. 104-132 acknowledges the problems that were the focus of *Teague*, but responds in an entirely different way. Rather than adjusting the federal courts' attitude toward prior state court judgments as a means to account for delays between state and federal adjudication, this new statute takes the direct route. Pub. L. 104-132 expedites the habeas process, thus reducing delays and, into the bargain, redressing any difficulties that flow from the evolution of federal law over time. By ensuring that federal habeas comes promptly on the heels of state adjudication, Pub. L. 104-132 changes the statutory foundation on which *Teague* was premised. This new statute necessarily uproots judicially-crafted doctrines developed to respond to concerns about habeas that had emerged since Congress last legislated in this field nearly thirty years ago. This is true for the rules governing second and successive petitions.[122] It is also true for the rules governing the effect of prior state court judgments on the merits.[123]

Congress has now reentered the habeas field, and the result is vitally important: The sharp line the Court formerly drew in *Griffith* and *Teague* between claims raised on direct review and claims raised in habeas is no more. The availability of federal habeas jurisdiction no longer turns on a strained attempt to decide whether a claim depends on "new" law, and the federal habeas courts are concomitantly relieved of the artificial search for "new" rules that

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122. *See supra* notes 35-41 and accompanying text.

123. The *Teague* doctrine was necessarily a construction of the habeas statutes as they were prior to Pub. L. 104-132. Congress was always able to legislate the effect the federal habeas courts should give to prior state judgments and thus to supplant the Court's attempts to resolve that problem. Justice White actually invited Congress to do this when *Teague* was first decided. Teague v. Lane, 489 U.S. 288, 317 (1989) (White, J., concurring).

previously absorbed their time and temper. Under the new statute, by contrast, the federal courts will address prior state adjudications forthrightly, decide whether the state courts reached the correct result, and act accordingly.[124]

B. Teague's *Remnants*

None of this is to say that the demise of the *Teague* doctrine proper eliminates *Teague's* influence entirely. Quite the contrary. The *Teague* doctrine occupied the ground that § 2254(d) now holds, and it only makes sense that some of the features of that doctrine can be helpful in developing the new regime envisioned by the statute. Chiefly, *Teague's* continuing influence will be felt with respect to the conditions that § 2254(d) fixes for its own application. Sometimes, the new statute operates as did *Teague*; sometimes not. To work through the intricacies, we can only turn to the statute's language and read it against the background of preexisting practice—including practice under *Teague*.

The preamble to § 2254(d) establishes a general rule that a federal habeas court shall not grant relief "with respect to any claim that was adjudicated on the merits in State proceedings . . . ." In this, the new statute recognizes three prerequisites to its application in any case. First, the existence of a qualifying state

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124. I see no warrant in § 2254(d) for reviving the old "retroactivity" doctrine the Court rejected for direct review cases in Griffith v. Kentucky, 479 U.S. 314 (1979), and for habeas cases in *Teague*. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618 (1965). See Yackle, *supra* note 73, at 2381-86. We are probably well rid of that. However, there are even more obvious deficiencies in the *Teague* doctrine. The attempt in *Teague* to withdraw habeas corpus from the wider body of case law on "retroactivity" was an intellectual failure. The new statute puts an end to that experiment and allows claims raised in habeas to be governed by the principles the Court follows in other instances in which the law is thought to develop underfoot. *E.g.*, Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); *Griffith*, 479 U.S. 314.

I do see warrant in § 2254(d) for reviving cases like Reed v. Ross, 468 U.S. 1 (1984), in which the Court accepted the novelty of a prisoner's legal claim as "cause" for his failure to raise it previously in state court. When the *Teague* doctrine barred "new rule" claims from habeas entirely (whether pressed on the state courts or not), *Reed* fell by the wayside. Now that § 2254(d) refuses to treat the novelty of a claim as a complete justification for denying habeas relief, *Reed* should come alive again. Under the new law, novelty is no longer a bar to federal habeas relief and may well be a justification for procedural default in state court. This, of course, is the same point I made previously about the provisions in Pub. L. 104-132 that expressly excuse prisoners who were not in a position to meet filing deadlines, to develop facts, or to include a claim in a prior federal petition—because the claim rests on a "new" rule that the Supreme Court has itself made retroactive. *See* note 121 *supra*. It may have been dissatisfaction with *Reed* that later produced *Teague*. See *Reed*, 368 U.S. at 26 n.3 (Rehnquist, J., dissenting). Now, dissatisfaction with *Teague* promises to resuscitate *Reed*.

court decision is a defense to a petitioner's claim for relief in federal court. Second, any such claim must have been "adjudicated" previously in state court. Third, that state "adjudication" must have been "on the merits."

As to the first condition, it seems sensible to engage the same rule that governed the applicability of the *Teague* doctrine prior to Pub. L. 104-132. If the existence of a previous state court judgment can be a defense to an application for federal relief, then § 2254(d) should be triggered in a particular case in the way that the *Teague* doctrine was triggered—when it is properly and seasonably raised by the party seeking its benefits, i.e., the respondent in a federal habeas action.[125]

When *Teague* was inapplicable to a habeas case, the federal court reached the merits in the ordinary course.[126] Since this new provision displaces *Teague*, it seems sensible to conclude that when it proves inapplicable in a particular instance, the federal court equally will turn to the merits. This is to say, the default position is independent merits adjudication in federal court, without direct reference to a previous state court adjudication and without any reference at all to the previous arrangements for habeas devised by the Court in *Teague*.

As to the second and third conditions for the application of § 2254(d), the *Teague* doctrine offers less help—for the obvious reason that *Teague* did not depend on the existence of a prior state judgment. This new statute, however, demands not only a previous state court "adjudication," but a previous adjudication "on the merits."[127] Initially, it appears that an "adjudication" must

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125. Collins v. Youngblood, 497 U.S. 37, 40-41 (1990). *See* Goeke v. Branch, 115 S. Ct. 1275 (1995)(concluding that the state had sufficiently preserved the issue); Schiro v. Farley, 114 S. Ct. 783 (1994) (indicating that a belated *Teague* argument might be heard as a means of defending a lower court judgment on alternative grounds). Of course, the respondent's burden differs from what it was under *Teague*, which called on the respondent to argue that the prisoner's claim depended on a "new rule" of law. Under *Teague*, there was no obligation to refer to a prior state court judgment on the claim. Under § 2254(d), the respondent must plead and prove the existence of such a state judgment.

126. *E.g.*, Schiro v. Farley, 510 U.S. 222 (1994).

127. The reference to federal relief "with respect to" a claim is ambiguous. Yet it seems inescapable that this provision must be limited to cases in which a state court previously rejected a prisoner's claim on the merits. If read in any other way, this language would make little sense. Consider, for example, a case in which the state and federal courts agree that a claim is meritorious, but disagree over whether the error was harmless. No one would seriously contend that this provision bars relief—because any relief at all would have to be "with respect to" the underlying claim. Both Brecht v. Abrahamson, 113 S. Ct. 1710 (1993), and O'Neal v. McAninch, 115 S. Ct. 992 (1995), assume there will be cases in which federal habeas relief is available when the state courts misjudge the effect of trial error. Unless § 2254(d) overrules those recent cases *sub silentio*, a federal court must have authority to

be more than a decision. After all, in its preamble, together with its very next paragraph, § 2254(d) refers to an "adjudication . . . that resulted in a decision." It follows that these two are not identical events; by contrast, the one is a consequence of the other. An "adjudication" is not a result (a disposition), but a process by which a result is reached.[128]

The requirement that the adjudication must have been "on the merits" seems plainly to specify the object of the state court "adjudication" that must have occurred. It is not enough that the state court considered something; it is essential that the state court "adjudicated" the "merits" of a particular claim—i.e., the bona fides of that claim.[129] There is a sense, too, in which "adjudication" on "the merits" touches the state court's result.[130]

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act in this hypothetical.

128. What kind of process? Surely a process sufficient to develop the material facts and to marshal the relevant legal arguments for judicial judgment. In a case in which the facts are in dispute, an "adjudication" requires state fact-finding procedures necessary to sort truth from falsehood: competent counsel, essential support services (investigators, experts, etc.), discovery—the usual tools by which adversaries delineate disputes of fact for resolution. Typically, an evidentiary hearing will be necessary—at which opposing counsel can present evidence, interrogate witnesses, and offer arguments. In all cases, of course, there must be an opportunity for the parties to brief and argue the issues.

What kinds of state court decisions should not be considered to have been reached via "adjudication"? I should think decisions based on judgments made by others (e.g., court staff); decisions that merely rubberstamp proposed findings or orders prepared by the state; decisions rendered before factual issues and legal arguments are considered; and decisions that reflect a fundamental misapprehension of the issues—thus indicating that the state court has not committed the necessary time and effort to the matter at hand. In this connection, the procedural standards listed in the previous version of § 2254(d) may be useful by analogy. Cases in which federal courts found state process wanting under those standards may provide illustrations of the kinds of state court behavior that should not count as "adjudication" under the new statute.

129. A judgment "on the merits" cannot include any disposition short of a decision that a claim lacks the factual or legal support necessary to obtain relief—*ceteris paribus*. A decision that a claim was procedurally barred, or a summary dismissal unaccompanied by an explanation anchored in the merits of a particular claim, simply cannot answer here. Similarly, the "merits" were not determined if the state court refused to consider a claim on the ground that it depended on a "new" rule of law. *Cf.* Schiro v. Farley, 114 S. Ct. 783, 788-89 (1994) (distinguishing the validity of a *Teague* defense from the "merits" of a prisoner's underlying claim). To ensure that the state court considered the substantive power of a claim and found it wanting, the respondent should be asked to produce some written statement from the state court to that effect.

130. The prerequisites for "merits" adjudication may be informed by the decisions on a prisoner's obligation to exhaust state remedies before seeking federal habeas relief. That obligation to exhaust is perpetuated by a separate provision in Pub. L. 104-132. *See* notes 11-16 and accompanying text *supra*. A prisoner can satisfy the exhaustion doctrine only by alerting the state courts to the nature of the claim so that they can comprehend its federal character. Duncan v. Henry, 115 S. Ct. 887 (1995). Likewise, a state court "adjudication" should not be considered to have been "on the merits," if the state court failed clearly to

V. SECTION 2254(d) IN CONTEXT

If we posit that what I have said thus far is accurate, if we accept that Pub. L. 104-132 deals with delays and shifting legal standards by expediting the habeas process, and if we take it that *Teague* has been eclipsed in the main, it remains still to place a sensible construction on the language in § 2254(d). I mean to argue that notwithstanding the loose talk in the floor debates, § 2254(d) authorizes the federal habeas courts to award relief if they conclude that the state courts previously misjudged federal claims—and does *not* call upon the federal courts to "defer" to "reasonable" state court decisions on the meaning of the United States Constitution.[131]

The language in § 2254(d) reflects a compromise solution to a controversy that had gripped the executive and legislative branches of the national government for more than fifty years.[132]

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recognize its federal nature and to pass on it as a federal matter. These two provisions in Pub. L. 104-132 complement each other: both anticipate that the state courts will give federal claims focused attention before federal habeas relief is sought.

The precedents on the effect of procedural default in state court equally fit this same model. Federal habeas corpus is barred if the prisoner failed to raise her federal claim in state court at the time and in the manner prescribed by state law, if the state courts (for that reason) refused to consider the claim on the merits, and if the resulting procedural ground of decision would preclude direct review in the Supreme Court under the "adequate and independent" state ground doctrine. Coleman v. Thompson, 501 U.S. 722 (1991). If, however, the state court overlooked the prisoner's default and reached the merits anyway, federal habeas is available. *See* Harris v. Reed, 489 U.S. 255 (1989). In order to determine whether the state court did, indeed, pass on the merits, the federal court must decide whether that court's decision "fairly appears to rest primarily on federal law." Coleman v. Thompson, 501 U.S. at 736 (quoting Michigan v. Long, 463 U.S. 1032, 1040 (1983)). Section 2254(d) asks the federal court to undertake a similar task.

In effect, § 2254(d) reverses the interests of the state in the basis of a prior state judgment. In default cases, the respondent typically seeks to establish that the state judgment was *not* on the merits and thus to foreclose federal adjudication on procedural grounds. Here, the respondent may wish to prove that the state court reached the merits. In the default cases, the petitioner bears the burden of establishing an adjudication on the merits. Ylst v. Nunnemaker, 501 U.S. 797 (1991). Here, I have argued that the respondent bears that burden.

131. Of course, the justices who now control the Court have made it clear that, notwithstanding Justice Thomas' view of the matter, *Teague*, too, was consistent with the independent adjudication principle established in *Brown*. *See* Wright v. West, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring); *id.* at 307 (Kennedy, J., concurring). As Justice O'Connor has said, a state court's judgment on the merits of a constitutional claim has never been allowed to stand "because it was reasonable." *Id.* at 305.

132. I have traced the congressional debates over habeas in greater detail elsewhere. Yackle, *supra* note 73. Here, I lay aside other currents in the larger tide, particularly failed attempts by congressional liberals to overrule restrictive Supreme Court decisions, and focus entirely on the single-minded efforts of conservatives to enact statutory limits on federal habeas practice.

Allowing for some backing and filling, the pattern that controversy followed is quite clear. Proponents of curbs on habeas corpus initially sought to eliminate the federal courts' authority to award relief on the basis of claims previously rejected in state court—either by repealing the federal courts' jurisdiction outright or by giving prior state judgments preclusive effect. When those efforts failed in the face of intense opposition, proponents made concessions in three stages—each, in turn, offering additional assurance that the federal courts would not be denied power to grant relief with respect to meritorious claims.

First, proponents of restrictive legislation produced statements assuring members of Congress that, under their program, the federal courts would retain the ability to award habeas relief—if the state courts reached decisions that could not be said to be "reasonable." Second, when many members expressed concern that background documents might not temper the explicit terms of a new statute, proponents agreed to incorporate their statements about deference to "reasonable" state decisions into the text of their bill. Third, when critical members still were not convinced, proponents adjusted their proposal yet again, this time eliminating the requirement that federal courts must defer to "reasonable" state judgments, and, instead, making it clear that federal relief would be available if prisoners demonstrate they are in custody on the basis of erroneous state court judgments on the merits. It was this last change in the language of the bill earlier this year that finally won acceptance and now, as a result, has become law.

A. *Initial Assaults*

In the mid-1940s, a special committee of the Judicial Conference of Senior Circuit Judges, chaired by Judge John J. Parker, drafted several habeas initiatives, one of which would have eliminated the federal courts' jurisdiction to grant relief with respect to

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I do not propose to harvest the meaning of the provisions of Pub. L. 104-132 from the floor debates alone. I do think, though, that those debates constitute legitimate grist for the interpretive grinder and that, given their due, they endorse an understanding of the bills that is also (and independently) grounded in their text and other features on the habeas landscape. Proponents explained the contents of their bills to their colleagues in an extensive, substantive debate. It seems only sensible, then, to take what they said seriously. *Cf.* Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 115 S. Ct. 2407, 2416 (1995) (attaching particular significance to the explanations of a bill provided by its floor manager); City of Edmonds v. Oxford House, 115 S. Ct. 1776, 1782 n.9 (1995) (relying on other provisions enacted contemporaneously with the statute under examination as a telling indication of the meaning that statute could sensibly bear); *cf.* Hubbard v. United States, 115 S. Ct. 1754, 1757-58 (1995) (recognizing that in criminal cases Congress itself has expressly asked the courts to take the context of statutory terms into account).

claims that had previously been considered and rejected in state court.[133] When that proposal evoked opposition, the Parker Committee abandoned it in favor of other, procedural measures—among them a codification of the exhaustion doctrine. That revised package was enacted as part of the general revision of the Judicial Code in 1948.[134] Thereafter, in *Brown v. Allen*,[135] the Supreme Court confirmed that the Habeas Corpus Act, as amended, authorized the federal courts to exercise independent judgment regarding legal and mixed questions—notwithstanding previous state court decisions on those issues.

In the wake of *Brown*, the Parker Committee offered a new proposal that would have deprived the federal courts of authority to award relief on the basis of claims previously found wanting in state court—provided the state courts arrived at their decisions in a "fair and adequate" manner.[136] In this, the Committee borrowed from Professor Paul Bator, who had recently advanced the thesis that federal habeas should be governed by the "process model" typically associated with the law of preclusion.[137] By Bator's account, the federal courts should have jurisdiction to entertain habeas petitions from state prisoners, but should be precluded from granting relief on the basis of claims the state courts rejected—after "full and fair" process.[138] The federal courts, accordingly, should focus not on whether the state courts reached correct outcomes, but rather on whether those courts engaged a process that assured "a reasoned probability that the facts were correctly found and the law correctly applied."[139] Concerning outcomes, Ba-

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133. *See generally* John W. Winkle, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263 (1985).

134. See S. REP. No. 1527, 80th Cong., 2d Sess. (1948).

135. 344 U.S. 443 (1953).

136. Specifically, the Committee proposed that a federal court should be able to entertain a collateral attack on a state court judgment only on a ground which presents a substantial Federal constitutional question;

(1) which was not theretofore raised and determined;

(2) which there was no fair and adequate opportunity theretofore to raise and have determined; and

(3) which cannot thereafter be raised and determined in a proceeding in the State court, by an order or judgment subject to review by the Supreme Court of the United States on writ of certiorari.

Report of the Committee on Habeas Corpus, 33 F.R.D. 363, 367 (1964); *see Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess 1 (1955).

137. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

138. *Id.* at 456-57.

139. *Id.* at 455.

tor contended that a prisoner was "legally detained if he [was] held pursuant to the judgment. . .of a competent [state] tribunal. . ., even though the decision to detain rested on an error as to law or fact."[140] Incorporating this thesis, the new Parker Committee bill was introduced on numerous occasions over the next several years, but never won acceptance.[141]

In 1968, both the idea of giving prior state judgments preclusive effect in federal habeas and the idea of eliminating the federal courts' subject matter jurisdiction were revived in the Omnibus Crime Control and Safe Streets Act, sponsored by Senators Ervin and McClellan.[142] That sweeping proposal elicited an outpouring of opposition, and in response its proponents withdrew it.[143]

Recognizing that any attempt to withdraw the federal courts' habeas jurisdiction would be resisted, the Nixon Administration built its plan for the writ chiefly on Bator's model. In a presentation to the Judicial Conference Subcommittee on Habeas Corpus, the Justice Department suggested that the federal courts should retain their formal authority to entertain petitions from state prisoners, but that they should be instructed to give "conclusive weight" to previous state judgments—so long as prisoners were accorded "an adequate opportunity to have full and fair consideration" of their claims in state court.[144] Senator Hruska introduced a

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140. *Id.* at 447-48 (quoting HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1238 (1953)).

141. *See* Brief on behalf of Benjamin R. Civiletti, Nicholas Katzenbach, Edward H. Levi, Elliot L. Richardson, et al., Wright v. West, 505 U.S. 277 (1992). In 1966, by contrast, Congress enacted different amendments, proposed by the Judicial Conference of the United States, which took *Brown* as their premise and established a general, rebuttable presumption in favor of state court findings of historical fact, as opposed to state court conclusions of law or applications of law to fact. *See* S. REP. No. 1797, 89th Cong., 2d Sess. (1966). On the Bator model, *see* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).

142. A key provision of that bill read as follows:

> The judgment of a court of a State upon a plea or verdict of guilty in a criminal action shall be conclusive with respect to all questions of law or fact which were determined, or which could have been determined, in that action until such judgment is reversed, vacated, or modified by a court having jurisdiction to review by appeal or certiorari such judgment; and neither the Supreme Court nor any inferior court ordained and established by Congress under Article III of the Constitution of the United States shall have jurisdiction to reverse, vacate, or modify any such judgment of a State court except upon appeal from, or upon review thereof by the highest court of that State having jurisdiction to review such judgment.

S. 917, 90th Cong., 2d Sess. § 702 (1968). *See* S. REP. No. 1097, 90th Cong., 2d Sess. 63-65 (1968).

143. *See* 114 CONG. REC. 11,234, 14,181-84 (1968); 119 CONG. REC. 2221 (1973).

144. Letter from William H. Rehnquist, Assistant Attorney General, to J. Edward Lumbard, Circuit Judge (Aug. 20, 1971).

bill containing such a plan a short time later. When the full Judicial Conference opposed that bill, however, it died without reaching the floor.[145] Once again in the 1970s, accordingly, the intense opposition to measures that would undercut the federal courts' ability to award relief on the basis of meritorious claims parried bills of that kind.

Efforts to restrict habeas resumed in the early 1980s when a Task Force on Violent Crime recommended various procedural amendments to the Habeas Corpus Act,[146] and bills along those lines were introduced in both houses of Congress.[147] In the hearings that followed, Justice Department witnesses expressed reservations about measures that touched only procedural matters and argued that, in addition, Congress should enact a new statute restricting the scope of the federal courts' function with respect to the merits of claims.[148] At that time, the Department still preferred "simple abolition" of the federal courts' jurisdiction to issue the writ on behalf of state convicts.[149]

B. *The Compromises Necessary for Victory*

1. *The First Concession.* The failures of the past made it clear that it was politically infeasible either to repeal the Habeas Corpus Act entirely or to limit the federal courts to an assessment of state process. Accordingly, when the Reagan Administration unveiled its own reform package, it bowed to political reality. The new Administration's bill contained a provision that, on its face, incorporated Bator's model: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings. . . ."[150]

Yet in accompanying commentary, the Justice Department made the first of the three concessions that would ultimately pro-

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145. S. 567, 93d Cong., 1st Sess. (1973). The Justice Department also championed a proposal to limit the federal courts to claims directly related to guilt or innocence, and the Hruska bill also incorporated that idea. *See* Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

146. *Report of the Attorney General's Task Force on Violent Crime: Hearings Before the Subcomm. on Crime of the House Committee on the Judiciary*, 97th Cong., 1st Sess. 321 (1981).

147. S. 653, 97th Cong., 1st Sess. (1981); H.R. 5679, 97th Cong., 1st Sess. (1981).

148. *Hearings on S. 653 Before the Subcommittee on Courts of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 32 (1982) (statement of Jonathan C. Rose on behalf of the Department of Justice).

149. William French Smith, *Proposals for Habeas Corpus Reform, in* CRIMINAL JUSTICE REFORM: A BLUEPRINT 137, 147 (1983).

150. S. 2216, 97th Cong., 2d Sess. § 5 (1982).

duce an enacted habeas corpus law. The Department explained that, despite its express language, this provision would retain the federal courts' ability to adjudicate the validity of prisoners' claims on the merits. Under the "full-and-fair" program, federal habeas corpus would not be restricted to an examination of the adequacy of state court process. By contrast, the federal courts would retain authority to judge the validity of state court outcomes—albeit indirectly in the traditional manner of habeas jurisdiction.

This is not to say that the full-and-fair plan would perpetuate *Brown v. Allen*. The Justice Department's commentary criticized *Brown* and explained that under the bill the federal courts' consideration of previous state court judgments would be different. In essence, state decisions on the merits would have to be "reasonable":

> [A] state adjudication would be full and fair in the sense of the proposed subsection (d) if: (i) the claim at issue was actually considered and decided on the merits in state proceedings; (ii) the factual determination of the state court, the disposition resulting from its application of the law to the facts, and its view of the applicable rule of federal law were reasonable; (iii) the adjudication was consistent with the procedural requirements of federal law; and (iv) there is no new evidence of substantial importance which could not reasonably have been produced at the time of the state adjudication and no subsequent change of law of substantial importance has occurred.[151]

For years thereafter, Republican proponents of limits on habeas advanced numerous bills containing the full-and-fair provision—always accompanied by this same (inconsistent) assurance that they meant to maintain the federal courts' ability to adjudicate the merits of claims—in order to decide whether previous state decisions were "reasonable."[152] On that basis, the Senate

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151. *The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. 98 (1982) (analysis of bill text).

152. *E.g., Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 153-54 (1991) (statement of Andrew G. McBride, Associate Deputy Attorney General, Dep't of Justice). Dissenting from a committee report endorsing a Democratic bill in 1991, House Republican leaders reconfirmed this initial concession:

> The full and fair standard of review in the [alternative Republican] proposal encompasses two essential requirements:
>
> (1) the state determination must be reasonable, including a reasonable interpretation and application of federal law, and a reasonable determination of the facts in light of the evidence presented to the state court; and
>
> (2) [t]he state adjudication must be carried out in a manner consistent with the procedural requirements of federal law that apply in state proceedings. . . .
>
> Review under this standard is not limited to considering the adequacy of the

passed bills including the full-and-fair program in 1984[153] and 1991.[154] Yet reform legislation containing the full-and-fair rule was never enacted.[155]

The full-and-fair program failed for two reasons. First, many members of Congress were concerned that the full-and-fair provision would be read literally to embrace Professor Bator's approach, such that federal courts would be forced to rubberstamp state court outcomes, so long as the state procedures in which those outcomes were reached were adequate.[156] On this point, critics insisted

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procedures used by the state courts, but includes, as indicated above, a determination by the federal habeas court that the state decision was reasonable. This understanding has been consistently maintained by the proponents of the proposal throughout its decade-long consideration by Congress.

H. REP. 102-242, 102d Cong., 1st Sess. 394 (1991) (citing previous instances in which authoritative proponents of the full-and-fair formulation had explained it in this way).

153. S. 1763, 98th Cong., 1st Sess. (1984); *see generally* S. REP. No. 226, 98th Cong., 1st Sess. (1983); 130 CONG. REC. 1854-72 (1984).

154. 137 CONG. REC. S8660-61 (daily ed. June 26, 1991) (showing the adoption of an amendment to the pending Democratic crime bill).

155. As reform bills stumbled repeatedly over the full-and-fair program, the Supreme Court concluded that problems associated with habeas corpus proceedings in death penalty cases demanded prompt attention. In the summer of 1988, Chief Justice Rehnquist asked Justice Powell to chair a special ad hoc committee of the Judicial Conference, charged to study capital habeas cases and offer recommendations. The Powell Committee's report, filed in 1989, suggested numerous adjustments in habeas practice in death penalty cases, but presupposed that the federal courts would continue adjudicating the merits of claims independently. Most Republican reform bills thereafter embraced at least some of those recommendations, albeit most of those bills contained the full-and-fair provision as well—despite the apparent inconsistency. *E.g.*, S. 635, 102d Cong., 1st Sess. (1991); H.R. 1400, 102d Cong., 1st Sess. (1991).

156. In 1991, Senator Graham condemned the full-and-fair rule on precisely this ground: "Essentially, [the full-and-fair formulation] says that if the Federal court finds that the State court. . .dealt in a full and fair manner, the Federal court is precluded from any further consideration." 137 CONG. REC. S8654 (daily ed. June 26, 1991) (statement of Sen. Graham).

Reacting to a full-and-fair amendment by Rep. Hyde in 1991, the chair of the House Judiciary Committee, Rep. Brooks, argued as follows: "The fine print says that if a State simply declares that a person was given a full and fair proceeding, the actual fact of whether the 14th amendment protections of due process and equal protection were provided does not matter." 137 CONG. REC. H7999 (daily ed. Oct. 17, 1991) (statement of Rep. Brooks).

Rep. Edwards, chair of the relevant subcommittee, agreed: "[T]here is no precedent for saying that ['full and fair adjudication'] means anything but procedural compliance. . . . [F]ull and fair means only procedural fairness." *Id.* at 7894 (statement of Rep. Edwards).

Rep. Jenkins offered a similar view: "What 'full and fair adjudication' really means is that if the State court proceeding was procedurally adequate, the fact that the State court was dead wrong on the law is irrelevant." *Id.* at H8000 (statement of Rep. Jenkins).

Other opponents agreed. Rep. Hughes had this to say: "[A] State court decision can be full, fair, and, at the same time, dead wrong. 'Full and fair' goes to procedural rights." *Id.* at H8003 (statement of Rep. Hughes).

Rep. Fish, the ranking Republican member of the Judiciary Committee, voiced the

that if the language of a statute clearly indicated such a process model, nothing in the legislative history would persuade the courts to read it in another, unfamiliar way.[157]

Second, even if the full-and-fair formulation were understood to permit the federal courts to ensure that state decisions were "reasonable," many members were also concerned that violations of constitutional rights would still go uncorrected. In their view, the federal courts should continue to award habeas relief if the state courts were wrong, not just "unreasonably" wrong. On this further point, critics focused particular attention on state court applications of federal legal standards to the facts of particular cases—that is, on mixed question cases. They insisted that the federal courts should not be told to defer to erroneous state judgments on mixed questions merely because the state courts acted "reasonably."[158]

The full-and-fair scheme was not only unsuccessful. It elicited competing proposals from Democrats and moderate Republicans like Senator Specter. Those competing programs typically either endorsed *Brown* by implication or proposed expressly to codify the Court's decision in that case.[159] As the battle lines were drawn, Senator Specter developed an especially important position between the warring camps. For his own part, Specter argued that Congress should concentrate on expediting the habeas process. In that vein, he urged his colleagues to eliminate the usual requirement that capital petitioners exhaust state postconviction remedies and to establish timetables for federal court action on habeas peti-

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same understanding of the full-and-fair formulation: "[T]his standard leaves the Federal courts without power to remedy constitutional violations if State courts have considered the issue in a procedurally fair forum." *Id.* at H8001 (statement of Rep. Fish).

157. For doubts regarding the likelihood that background assurances would ensure that the statute would not be read to restrict the federal courts to an appraisal of process, see *The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. 153-54 (1982) (testimony of Phyllis Skloot Bamberger, Attorney in Charge, Appeals Division, Federal Defender Services Unit, Legal Aid Society of New York).

158. Resisting the full-and-fair plan in 1991, Rep. Hughes argued as follows:

> The Department [of Justice] states that this ["full and fair"] language still permits Federal Courts to reverse State errors "where a State court defied or disregarded Supreme Court precedent." The Federal writ of habeas corpus exists to correct erronious [sic] applications of law. It is not limited to rulings which defy or show contempt for Supreme Court precedent. It is not limited to rulings which are both erroneous and arbitrary, nor ones which are erronious [sic] and unreasonable.

137 CONG. REC. H8004 (daily ed. Oct. 17, 1991) (statement of Rep. Hughes).

159. *E.g.*, H.R. 5269, 101st Cong., 2d Sess. (1990); *see* H. REP. No. 681, 101st Cong., 2d Sess. (1990).

tions.[160] Specter made it clear, however, that he opposed the full-and-fair plan, because it would undercut the federal courts' ability to exercise independent judgment on the merits of claims.[161]

On one occasion in 1990, Specter convinced Senator Thurmond and other key Republicans to endorse a bill that would have made the kinds of procedural adjustments that Specter favored—without touching the federal courts' consideration of the merits of claims. The Senate adopted that bill, but it was later dropped in conference. Specter introduced essentially the same bill in the 102d and 103d Congresses, always obtaining significant support, but never again managing a majority.[162]

2. *The Second Concession.* As time wore on, support for alternatives to the full-and-fair formulation continued to build in both bodies. And in response, proponents of a restrictive bill extended the second concession crucial to their ultimate success. In October of 1991, the House was debating a Democratic habeas bill opposed by the Republican leadership. The floor manager on the Republican side, Rep. Hyde, initially offered an amendment con-

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160. *E.g.*, 137 CONG. REC. S8873-S75 (daily ed. June 27, 1991) (explaining the timetables he had in mind).

161. Sen. Specter explained:

> The bill which I have proposed preserves Federal habeas corpus in its entirety. When my distinguished colleague from Delaware talks about some who want to eliminate Federal habeas corpus because of the full and fair doctrine, that is not this Senator. I believe that the full and fair doctrine would just result in more remands to the State court to decide what was full and fair.

139 CONG. REC. S15,738 (daily ed. Nov. 16, 1993) (statement of Sen. Specter).

In 1991, Specter voted for a full-and-fair initiative by Senators Thurmond and Hatch—apparently because the proponents agreed to include in their bill the kind of timetables he advocated for federal court action on habeas petitions. 137 CONG. REC. S8656, S8661 (daily ed. June 26, 1991) (statement of Sen. Specter). On the floor, Specter muted the significance of the full-and-fair rule and, indeed, insisted that it would permit the federal courts to "deal with the merits." *Id.* at S8656.

Senator Biden responded that Specter's assessment of the full-and-fair rule was "much more generous" than anyone else's. *Id.* at S8664. Specter persisted, but it was plain that his heart was not in it. *Id.* at S8665 (conceding that the full-and-fair provision was "virtually impossible to understand"). After a conference committee dropped the Senate full-and-fair program (and his own procedural provisions with it), Specter joined a Republican filibuster that defeated the entire crime bill in the 102d Congress. Specter complained that the conference committee's plan failed to embrace his ideas for expediting capital cases. He pointedly explained, however, that he did not fault the conference report for dropping the Senate-passed full-and-fair provision: "I supported the Senate-passed habeas reform proposal because in most respects I supported its provisions. I was deely [sic] concerned, however, about the restriction of habeas review when an issue had received a full and fair adjudication in the State courts." 137 CONG. REC. S18682 (daily ed. Nov. 27, 1991).

162. *See, e.g.*, S. 19, 102d Cong., 1st Sess. (1991); 137 CONG. REC. S620 (daily ed. Jan. 14, 1991).

taining the full-and-fair provision. When that provision evoked the usual resistance, Rep. Hyde withdrew his amendment in favor of a substitute that, in effect, supplanted the full-and-fair section with the following new provision:

> An adjudication of a claim in State proceedings is full and fair within the meaning of this section. . .unless the adjudication—
>
> (1) was conducted in a manner inconsistent with the procedural requirements of Federal law that are applicable to the State proceeding;
>
> (2) was contrary to or involved an arbitrary or unreasonable interpretation or application of clearly established Federal law; or
>
> (3) involved an arbitrary or unreasonable determination of the facts in light of the evidence presented.[163]

The import of this initiative was clear. It responded forthrightly to one of the two principal arguments that critics had raised against the full-and-fair formulation. If other members in the House were concerned that the full-and-fair provision would limit the federal courts to an evaluation of state court process, and if those members could not be persuaded that a statement to the contrary in the legislative history would rebut that understanding, then Hyde would lift his explanation of the full-and-fair provision into the bill itself.[164] This was an enormously important move on the part of Republican proponents of habeas legislation in the House. After this point, they abandoned further attempts to impose Bator's model and substituted statutory language ensuring that the federal courts would continue to address the substantive merits of claims raised in habeas corpus.[165]

Notwithstanding this second significant concession, key members of the House remained dissatisfied. Democrats and Republicans alike expressed the view that Rep. Hyde's substitute still would not allow the federal courts the independence needed to enforce federal rights. Still, the federal courts would be unable to

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163. 137 CONG. REC. H7996 (daily ed. Oct. 17, 1991).

164. Rep. Hyde was frank to admit that his actions were in response to the opposition: "It is true that the Judicial Conference was unhappy with the full and fair standard until we offered an amendment which covers more than just procedural reasonableness." 137 CONG. REC. H7895 (daily ed. Oct. 16, 1991) (statement of Rep. Hyde).

165. *See* 137 CONG. REC. H8003-H04 (daily ed. Oct. 17, 1991) (statement of Rep. Hughes) (acknowledging Rep. Hyde's concession, albeit finding his effort inadequate). The Reagan Justice Department had once admitted that its explanation of the full-and-fair rule might better be substituted for the full-and-fair rule itself in the text of the original bill in 1982. *See The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. 33 (1982) (response to criticism offered by Attorney Jim Smith of Florida). It is telling, then, that this move was not made by proponents of the full-and-fair plan until nearly a decade later—when the move was made defensively.

correct erroneous state judgments on legal and mixed questions, but would be limited, instead, to curing "arbitrary" or "unreasonable" state court errors.[166] And in the end, the House rejected the Hyde substitute in favor of the bill advanced by the Democratically-controlled Judiciary Committee—which, of course, contained neither the full-and-fair plan nor the language in Rep. Hyde's substitute.[167]

A conference committee appointed to reconcile the House and Senate bills in the 102d Congress accepted the House habeas language over a full-and-fair program adopted by the Senate. The House embraced the conference report,[168] but a filibuster in the Senate prevented further action in that body.[169] Similar disagreements between Democrats and Republicans in the Senate also prevented passage of reform legislation in the 103d Congress.[170] Then, too, the Republican leadership's insistence on the full-and-fair plan eliminated the chance for compromise. Importantly, however, Senator Specter obtained 34 votes for his own alternative bill in the 103d Congress—a bill that would have explicitly repudiated the full-and-fair rule.[171]

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166. Rep. Fish in particular said that the Hyde substitute was insufficient:

> It is clear that the attempted definition of "full and fair adjudication" does not alleviate. . .concerns [about leaving the federal courts unable to cure state court error on the merits]. The judiciary, the ABA, and much of the legal community strongly opposes "full and fair," even as defined by the gentleman's amendment.

137 CONG. REC. H8001 (daily ed. Oct. 17, 1991) (statement of Rep. Fish).

167. H.R. 3371, 102d Cong., 2d Sess. (1991). Rep. McCollum said at the height of the debate that he saw "no reason" why the House would not adopt Rep. Hyde's habeas initiative, which simply carried forward the same full-and-fair program that members had "been debating . . . for a number of years . . . ." 137 CONG. REC. H7971 (daily ed. Oct. 16, 1991) (statement of Rep. McCollum). There was, however, a very good reason: the votes for full-and-fair simply could not be found.

168. 137 CONG. REC. H11,756 (Nov. 26, 1991).

169. For unsuccessful cloture votes, *see* 137 CONG. REC. S18,615-616 (daily ed. Nov. 27, 1991); 137 CONG. REC. S3926-44 (daily ed. Mar. 19, 1992).

170. In the fall of 1993, Senators Biden and Hatch agreed to eliminate all habeas corpus measures from the crime bill in order that divisions over their competing initiatives would not derail crime legislation entirely, as had been the case in the previous Congress. The agreement was announced by Senators Mitchell and Dole, 139 CONG. REC. S15,584-85 (daily ed. Nov. 10, 1993), and was later explained by the floor leaders themselves. *See* 139 CONG. REC. S15,810 (daily ed. Nov. 17, 1993) (statement by Senator Hatch); *id.* at S15,810-11 (also confirming the agreement).

171. S. 1657, 103d Cong., 1st Sess. (1993); *see* 139 CONG. REC. S15,815 (daily ed. Nov. 17, 1993). Senator Specter's initiative included most of Senator Biden's bill at the time, S. 1441, 103d Cong., 2d Sess. (1993), 139 CONG. REC. S10925-31 (daily ed. Aug. 6, 1993), which contained the following provision:

> Section 2254(a) of title 28, United States Code, is amended by adding at the end the following: "Except as to Fourth Amendment claims controlled by Stone v. Powell, 428 U.S. 465 (1976), the Federal courts, in reviewing an application under

3. *The Third and Crucial Concession.* The statute finally enacted by the 104th Congress is the product of two convergent events—the election of many new Republican members in 1994 and the concessions that proponents made to doubtful colleagues, old and new. Having failed to satisfy opponents with their first and second concessions, Republican leaders offered a third and decisive concession, which finally won the day. The critical events unfolded in the following way.

a. *Initial House Action in the 104th Congress.* Republican leaders in the House originally introduced a new habeas bill that omitted both the full-and-fair rule and Rep. Hyde's 1991 substitute. Setting to one side any attempt to affect the federal court's treatment of the merits of claims, that original "Contract with America" bill focused entirely on procedural changes in the habeas system, especially in the processing of capital cases.[172]

It was not until the "contract" bill was on the floor that Rep. Cox proposed an amendment addressed to the federal courts' function with respect to the merits. That amendment was adopted and thus became part of the House crime bill in 1995. The Cox amendment tracked the Hyde substitute in 1991:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was decided on the merits in State proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was based on an arbitrary or unreasonable interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States;
>
> (2) resulted in a decision that was based on an arbitrary or unreasonable application to the facts of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; or
>
> (3) resulted in a decision that was based on an arbitrary or unreasonable determination of the facts in light of the evidence presented in the State proceeding.[173]

While this amendment plainly sought to affect the federal courts' consideration of prior state court judgments on the merits, it deliberately avoided the process model associated with the full-

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this section, shall review de novo the rulings of a State court on matters of Federal law, including the application of Federal law to facts, regardless of whether the opportunity for a full and fair hearing on such Federal questions has been provided in the State court.

Id. at S10928.

172. H.R. 3, 104th Cong., 1st Sess. (1995).

173. 141 CONG. REC. H1424 (daily ed. Feb. 8, 1995).

and-fair program. That idea had been repudiated in the House on many occasions and could no longer be seriously advanced. Following the course previously charted by Rep. Hyde, this new provision conceded on its face that the federal courts would continue to consider the merits of prisoners' claims. Still, the exacting language in the Cox amendment suggested that the scope of federal adjudication would be tightly circumscribed.

Under the Cox amendment, it appeared that a federal court would be unable to award relief on the basis of a claim that had previously been rejected in state court—even though the federal court concluded that the state court decision was erroneous and that the prisoner's federal constitutional rights had been violated. For the exceptions to the general rule against federal habeas relief were extremely narrow.

The first exception allowed a federal court to act if the prior state court decision was an "arbitrary or unreasonable interpretation" of constitutional law as "clearly established" in Supreme Court precedents. That language underscored the co-equal status of the state courts within the federal framework. A state court would be held to account only for adherence to federal law as elaborated by the Supreme Court itself (not, this is to say, by the lower federal courts). Moreover, a state decision on the merits would be sufficient to justify a prisoner's detention so long as it was not "arbitrary or unreasonable." Bluntly stated, a federal habeas court would have to defer to a previous state court decision, even if the state judgment was erroneous in the federal court's eyes.

The second exception overlapped with the first, but apparently dealt more directly with state court decisions on mixed questions of law and fact. Under the Cox amendment, a federal court would be unable to grant relief on a claim, unless the state court decision constituted an "arbitrary or unreasonable" application of "clearly established" constitutional principles to the facts of an individual case. Thus it appeared that a federal court would be barred from taking action even if the state court misapplied the correct legal standard—unless the state court's action was "arbitrary or unreasonable."

The third exception, which allowed a federal court to grant relief if the state court reached an "arbitrary or unreasonable" determination of the facts underlying a constitutional claim, added little flexibility, given the comparative rigidity of the first two exceptions. In the end, the Cox amendment would have barred the federal courts from granting relief in cases in which the state courts had committed serious error.

The Cox amendment was hotly debated on the floor. In some respects, Democratic leaders raised what were by now familiar ar-

guments. Thus Rep. Conyers condemned the Cox amendment as a "throwback" to the "full and fair concept" that had deadlocked Congress for years.[174] Conyers also argued that it was inconsistent with the procedural reforms in the principal bill—which presupposed that the federal courts would exercise independent judgment on the merits of prisoners' claims.[175]

An exchange between Rep. Watt and Rep. Cox was, however, more revealing. Initially, Rep. Watt argued that federal courts would find it difficult to label a state court decision "arbitrary and unreasonable" and thus would effectively be unable to act even in cases in which the Cox amendment appeared to permit federal relief.[176] Rep. Cox responded that his amendment referred to "arbitrary" state court action and "unreasonable" state court action in the disjunctive, not the conjunctive, and that, accordingly, the more demanding of the two standards (the requirement that the state court decision must have been "reasonable") rendered the other superfluous:

> Mr. Chairman, I just point out that the language of the amendments says reasonable. It also says arbitrary. But a separate standard is reasonable. It is arbitrary or unreasonable. Obviously, the reasonableness test is the more difficult to meet. Simply stated, the Federal courts will defer to reasonable decisions on the facts, reasonable decisions on the law, and reasonable decisions on mixed questions of law and fact made at [sic] the State courts.[177]

In this way, Rep. Cox expressly disowned the reference in his amendment to "arbitrary" state court decisions and retreated to the position that state decisions must be "reasonable" if they were to survive. With that explanation, Cox obtained sufficient votes to win passage in the House.[178] Still, that was as far as the Cox amendment moved in the 104th Congress.

b. *Subsequent Action in the Senate.* The decisive action on habeas in the 104th Congress occurred in the Senate. Senator Hatch initially introduced a bill containing the familiar full-and-fair provision.[179] Early on, however, Hatch recognized that, once again, there was strong opposition to the full-and-fair rule not only from Democrats, but also from Republicans like Senator Specter. Mindful of Specter's 34 votes in the preceding Congress, Hatch en-

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174. *Id.* at H1425.
175. 141 CONG. REC. H1347 (daily ed. Feb. 7, 1995).
176. 141 CONG. REC. H1426 (daily ed. Feb. 8, 1995).
177. *Id.*
178. *Id.* at H1427-28.
179. S. 3, 104th Cong., 1st Sess. (1994).

tered into negotiations with Specter in pursuit of a compromise bill on which both could agree. After some weeks of discussions, Hatch and Specter co-sponsored such a compromise bill,[180] and Hatch set his original bill aside. Both Hatch and Specter explained their new bill as a sensible compromise that would allow Specter to join the leadership of his party in a final drive for habeas corpus legislation.[181] The new Hatch/Specter bill was later incorporated into the Senate anti-terrorism bill in the 104th Congress, which won initial passage in the summer of 1995[182] and later was enacted as Pub. L. 104-132.

Like the Hyde substitute in 1991 and the recent Cox amendment in the House, the Hatch/Specter compromise bill dropped the full-and-fair provision and substituted a provision allowing the federal courts to award relief on the merits, notwithstanding prior state court action. Unlike the Cox initiative, however, the Hatch/

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180. S. 623, 104th Cong., 1st Sess. (1995).

181. 141 CONG. REC. S4590-96 (daily ed. Mar. 24, 1995). Introducing the new bill, Senator Specter listed his many previous attempts to obtain a majority for his own habeas bills. *Id.* at S4591-92. Explaining the agreement reached in this instance, Senator Hatch was explicit regarding his compromise with Specter: "[Senator Specter] has long been an advocate for habeas reform. Together, we have worked hard to craft a consensus bill that will enact meaningful reform of the Federal habeas corpus process. Today, we are introducing as legislation the product of those labors." *Id.* at S4596.

Later, Senator Specter said that he had agreed to co-sponsor the bill because, "in the current context in which habeas corpus appeals now run for as long as a couple of decades, the deterrent effect of capital punishment has been virtually eliminated." 141 CONG. REC. S7804 (daily ed. June 7, 1995). Senator Hatch, too, said that the bill was meant to "get rid of these frivolous appeals. . .and get the system so it works in a just and fair way. . . ." *Id.* at S7805. Moreover, Hatch insisted that the bill would "protect civil liberties and constitutional rights" while at the same time protecting the victims of crime and the general public from "incessant appeals." *Id.*

Resisting an amendment that would have limited the habeas provisions in the bill to prisoners attacking federal convictions, Senator Hatch said that some terrorism cases might give rise to state criminal charges. Then, he said:

> [If] we do not reform Federal habeas corpus review of State cases, then we will have the same incessant, frivolous appeals ad hominem [sic], day and night, from that point on because this amendment would not take care of that problem. If we are going to pass habeas reform, let us pass real habeas reform. Let us do it straight up. Let us protect the constitutional rights, which our amendment does do in the bill. Let us protect civil liberties, but let us get some finality into the law so that the frivolous appeal game will be over."

Id. at S7808.

Resisting another amendment regarding reimbursements for support services needed by appointed counsel in habeas cases, Hatch again explained that he was primarily concerned with "delay" and that he did not "want the victims of the Oklahoma City bombing to have to wait 17 or 20 years for justice." *Id.* at S7821. "That," he said, "is why we need habeas corpus reform." *Id.*

182. S. 735, 104th Cong., 1st Sess. (1995); 141 CONG. REC. S7857 (daily ed. June 7, 1995).

Specter bill made yet a third concession to members of Congress who remained troubled by the language that Cox had proposed. It was this third and final concession, and only this third and final concession, that ultimately summoned sufficient votes to pass a habeas corpus statute. Without it, proponents would once again have been frustrated by members who were so concerned about undermining federal adjudication of federal claims that they preferred a bill with no provision at all on the effect of previous adjudication in state court. The critical vote on the Senate floor was on an amendment by Senator Biden that would have deleted this single provision from the pending bill. That amendment failed by an extremely thin margin (53 to 46), with many Republicans voting for it.[183]

The character of the crucial final concession that Senator Hatch offered his critics is plain from the face of the language now in § 2254(d),[184] which departs from the Cox initiative in extremely important respects. Specifically, it makes at least two grammatical changes in the exceptions to the general rule against federal habeas corpus relief—adjustments that plainly confirm the ability of a federal court to grant relief when it finds a claim to be meritorious.

First, § 2254(d) as enacted drops any reference to "arbitrary" state departures from Supreme Court precedent. In this respect, § 2254(d) responds favorably to Rep. Watt's criticism of the Cox amendment in the House. Where Rep. Cox explained that the grammar of his amendment rendered its reference to "arbitrary" state decisions superfluous, § 2254(d) takes the unnecessary (but politically advantageous) further step of simply deleting reference to "arbitrary" state decisions. Second, and much more importantly, § 2254(d) also eliminates the significance of the reference to "unreasonable" state court decisions. The disjunctive "or" at the end of paragraph (1) is all-important. Just as a similar disjunctive in the Cox amendment rendered the reference to "arbitrary" state decisions in that amendment superfluous, so the disjunctive here renders § 2254(d)'s reference to "unreasonable" state court applications of federal law equally superfluous. The only language doing any genuine work in § 2254(d) is the language establishing the basic rule that a federal court is authorized to award habeas relief if a previous state court judgment was "contrary to" federal law as "clearly established" by the Supreme Court.

This last concession is extremely consequential. For it deliberately (and skillfully) abandons the chief objective that Republicans

183. 141 CONG. REC. S7849-50 (daily ed. June 7, 1995).

184. *See supra* note 4 and accompanying text.

had advocated for a dozen years: the goal of requiring a federal habeas court to defer to a "reasonable" state court decision on the merits—even if, in the federal court's view, the state judgment was in error. This concession was obviously painful to habeas critics, some of whom continued to defend a "reasonableness" rule on the Senate floor. Yet discarding that idea was absolutely vital to the compromise that won sufficient support from Senator Specter and others, so that the larger package of habeas corpus measures could finally be enacted.[185] Senator Hatch fully appreciated the significance of his action. He, too, continued to insist that "reasonable" state court decisions should be undisturbed. Yet now he had it that a state court judgment could not be both "reasonable" and "wrong."[186]

c. *The Floor Debates in the 104th Congress.* The effect of § 2254(d) on the substance of habeas adjudication was clarified in the floor debates when proponents reacted to an amendment by Senator Biden, which would have struck this provision from the Hatch/Specter bill. Senator Biden argued that § 2254(d) would undermine the independence of the federal courts in that it would require them to give "deference" to previous state court judgments. Biden plainly used the term "deference" in an extremely strong sense. As he read § 2254(d), it foreclosed a federal court

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185. 141 CONG. REC. S7846 (daily ed. June 7, 1995). It is true that the Hyde amendment also included the "contrary to" test (and also in the disjunctive). Yet that proposal also contained the reference to "arbitrary" state decisions, and Hyde himself focused almost exclusively on deference to "reasonable" state judgments. In any case, Cox plainly jettisoned any hope that might have sprung from the Hyde formulation.

186. In a hearing on S. 623 before the Senate Judiciary Committee, a witness on behalf of the American Bar Association, Douglas Robinson, expressed concern that the bill would prevent a federal court from granting habeas relief if a previous state court decision against the prisoner was "reasonable," but still "wrong." After the hearing, Senator Hatch sent Robinson a telling question in an apparent effort to clarify his testimony:

> You have testified that the provision of S. 623 that would require federal courts to defer in habeas petitions to state court adjudications that are not "unreasonable" interpretations of federal law, will result in the affirmance of state court interpretations of federal law which are, in your words, " 'reasonable,' even if they are wrong." Could you expand on how an interpretation of federal constitutional law could be wrong, that is contrary to established federal law, and yet still be a *reasonable* interpretation of the Constitution?

Letter from Orrin G. Hatch to Douglas G. Robinson (April 26, 1995) (on file with author) (emphasis in original).

It is plain from this rhetorical question that Senator Hatch had now collapsed the bill's reference to "unreasonable" state court applications of federal law into its reference to state decisions that were "contrary to. . .clearly established law." Now, according to Hatch, an erroneous state decision was necessarily both "contrary to" established law and "unreasonable."

from "examining what the State courts did in any event . . . ; "[187] Senator Biden acknowledged that the federal courts would retain authority to award relief in the case of "unreasonable" state court decisions, but he charged that such an "exception" was "illusory" and would not allow the federal courts to cure erroneous state decisions with respect to federal rights.[188]

Senator Hatch dismissed Biden's characterization of § 2254(d) out of hand and complained that Biden's staff had developed a misleading poster (set on a tripod in the well of the Senate chamber) that simply missed the point of the provision under discussion: "I notice [that] the. . .Biden staff-prepared poster. . .says that Specter-Hatch requires Federal courts to defer to State courts in almost all cases, even if the State is wrong about the U.S. Constitution. *That is absolutely false.*"[189]

Explaining his own bill in his own words, Hatch acknowledged that § 2254(d) would "change" the current "*de novo*" adjudication standard in habeas. He freely conceded that his bill would specify "the degree of deference" that a federal court must give to a previous state court judgment. But Hatch, for his part, used the term "deference" in an entirely different, everyday sense. To him, "deference" did *not* mean acquiescence but, instead, connoted consid-

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187. 141 CONG. REC. S7841 (daily ed. June 7, 1995). Indeed, Senator Biden associated the "rule of deference" he read into §2254(d) with the full-and-fair rule that had been advanced in previous bills, ostensibly to introduce preclusion into federal habeas corpus. *Id*; *see also* 141 CONG. REC. S7486 (daily ed. May 25, 1995) (statement of Sen. Biden).

188. 141 CONG. REC. S7842 (daily ed. June 7, 1995):

> First, the language sets out clearly what the general principle is. The general principle. . .is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top. . . .
>
> The second problem, in this instance, the bill seems to allow an exception to the general rule but one that is likely to be illusory because a claim can be granted only if the State court's application of Federal law to the facts. . .[was] not merely wrong but unreasonable. It could be wrong but viewed as reasonable.

Some opponents could never be convinced that the bill would not "eviscerate" habeas corpus for state prisoners by requiring the federal courts to "defer" to the state courts on the merits of claims and thus preventing the federal courts from "correcting" constitutional errors. *See, e.g.* 142 CONG. REC. S3458 (daily ed. April 17, 1996) (statement by Sen. Kennedy) (opposing the conference committee report); *id.* at S3438 (statement by Sen. Moynihan) (reading § 2254(d) to "hold that constitutional protections do not exist unless they have been unreasonably violated" and insisting that idea would "introduce a virus that [would] surely spread throughout our system of laws"). Senator Biden persisted in his own opposition to this provision, protesting at one point that it would bar a federal court from deciding whether a state court "accurately interpreted the Federal Constitution." 142 CONG. REC. S3357 (daily ed. April 16, 1996). Elsewhere, however, Biden acknowledged that § 2254 (d) might be in fact "much less onerous" than it appeared "on its face." 142 CONG. REC. S3475 (daily ed. April 17, 1996).

189. *Id.* at S7846 (statement by Sen. Hatch) (emphasis added).

eration, courtesy, and respect.

The goal of the bill was now to dispense with the notion that the federal courts should approach federal habeas cases "*de novo*"—in the special (habeas) sense that nothing the state courts have done already matters, rather than in the orthodox (appellate) sense that independent judgment should be brought to bear on an extant state court action. That goal could not be achieved in a harsh, ham-handed fashion, but only by means of a softer, textured notion—best articulated as a rule of reason:

> [The standard now in § 2254(d)] is a wholly appropriate standard. It enables the Federal court to overturn State court positions that clearly contravene Federal law. Indeed, this standard essentially gives the Federal court the authority to review de novo whether the State court decided the claim in contravention of Federal law.
>
> Moreover, . . . this . . . standard . . . allows the Federal court to review State court decisions that improperly apply clearly established Federal law . . . .
>
> What does this mean? It means that if the State court reasonably applied Federal law, its decision must be upheld. Why is that a problematic standard? After all, Federal habeas review exists to correct fundamental defects in the law. If the State court has reasonably applied Federal law it is hard to say that a fundamental defect exists.[190]

If anything, Senator Specter's explanation of "deference" was even more flexible. By his account, § 2254(d) leaves the federal courts with much the same independent authority they have always had—dating at least to his own days in the practice:

> Under the current bill [Hatch/Specter], I think there is still a good bit of latitude which the Federal judge will have when he makes a determination

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190. *Id.* at S7848. I will not say that Senator Hatch was rigorously consistent on this point. Defending his bill when it returned to the Senate after conference, he said that it would "require[] deference to state court action unless there is some very good reason not to defer" and characterized its effect as "a major, major, change in criminal law." 142 CONG. REC. S3362 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch). In the main, however, I think it is fair to say that Hatch explained the bill as an effort to get the federal courts to take proper account of prior state judgments: "Our proposed standard simply ends the improper review of State court decisions . . . . There is simply no reason that federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts." 142 CONG. REC. S3447 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch). Equally in the House, the floor manager, Representative Hyde, defended the conference report in much the same way. Responding to the dire predictions of some Democrats, Hyde said that under § 2254(d), "the federal judge always reviews the State court decision to see if it is in conformity with established Supreme Court precedence [sic], or if it [sic] has been misapplied." 142 CONG. REC. H3602 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde). So the new statute did not establish "a blank, total deference, but it is a recognition that you cannot relitigate these issues endlessly." *Id.*

> under a habeas corpus petition. There will be deference to the determinations of the state court, but the Federal judge will still have latitude to alter the State court decision in any case in which the Federal judge determines that it was contrary to or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. . . .
>
> So there still is latitude for the Federal judge to disagree with the determination made by the State court judge. It is my sense, having litigated these cases. . .that where there is a miscarriage of justice, the Federal court can come to a different decision than was made in the State court proceedings.[191]

Explanations like these disavow a radical shift from settled law. In the end, the proponents of restrictive legislation abandoned all their attempts to restrict the federal courts' ability to exercise independent judgment on the merits. They substituted another, distinctly different, means of ensuring proper attention for prior state judgments. Having failed to achieve agreement on a bill that would force the federal courts to defer to "reasonable" state court judgments, the proponents of reform shifted their sights to the feature of habeas practice in the modern era that critics had always found particularly objectionable: the federal courts' tendency to take up the merits of claims without (in the eyes of their critics) showing proper respect for previous judgments rendered by the state courts.

The statute actually enacted by the 104th Congress, and signed into law by the President, attends to that question and only that question. This new statute states, simply (and sensibly) enough, that when a federal court is asked to examine a claim that

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191. 141 CONG. REC. S7847 (daily ed. June 7, 1995) (statement of Sen. Specter). Specter vacillated considerably more than did Hatch. When the conference report was on the floor for final passage, he reviewed his many attempts to "streamline" the habeas process and negotiations with Hatch over the content of the current bill. At that point, he candidly admitted that he did not "favor" the "deference" the bill would accord to state judgments and lamented that a state decision would have to be "unreasonable" before a federal court could act. 142 Cong. Rec. S3471 (daily ed. Apr. 17, 1996) (statement of Sen. Specter). Specter said that the federal courts would not defer to the state courts regarding "determinations of Federal law," but he understood that "deference" would be owed to a state court "decision applying the law to the facts." He was "not entirely comfortable" with that result, but he insisted that the new "standard" would "allow Federal courts sufficient discretion to ensure that convictions in state court have been obtained in conformity with the Constitution." *Id.*

That, I think, is consistent with the interpretation of § 2254(d) that I am defending. Senator Specter, like Senator Hatch and Rep. Hyde, commonly (if not always consistently) promoted § 2254(d) as a means of focusing the federal courts on previous state adjudications and the question whether the state courts acted in conformity to federal law—whether, that is, they reached correct outcomes.

was previously adjudicated in state court, the federal court should not ignore the state court's work, but rather should begin with the state court adjudication as the baseline—that is, as the object of the federal court's exercise of independent judgment.[192]

This, indeed, is precisely the interpretation that President Clinton placed on § 2254(d) when he signed Pub. L. 104-132 into law:

> I have signed this bill because I am confident that the Federal courts will interpret these provisions [§ 2254(d) (as amended) and § 2254(e) (as amended)] to preserve independent review of Federal legal claims and the

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192. This interpretation, anchored both in the language of § 2254(d) and in its legislative history, is far more convincing than an alternative construction that has occasionally been advanced. *Cf.* 142 CONG. REC. S3471 (daily ed. Apr. 17, 1996) (statement of Sen. Specter); *see supra* note 191. That alternative construction has it that § 2254(d) adopts a rigid distinction between state court mistakes regarding abstract legal principles (i.e., mistakes in the articulation of pure legal standards) and state court mistakes regarding the application of abstract legal principles to individual cases (i.e., mistakes in the resolution of mixed questions of law and fact). Thus the reference to a state decision that was "contrary to . . . clearly established Federal law" is said to cover cases in which a state court identified the wrong standard to be applied in a case, and the reference to a decision involving "an unreasonable application of. . .clearly established Federal law" is said to cover cases in which a state court misapplied the correct standard. Any such reading of § 2254(d) faces three insurmountable problems.

First, it imputes to the drafters an utterly unrealistic understanding of the way in which courts handle constitutional questions. It is extremely rare that a state court (or any court) fails accurately to articulate a purely legal standard. That being true, it would make little sense to devote the key language in a statute of this kind to that peculiar situation and to leave other language (the "unreasonable application" language) to govern almost all actual cases.

Second, and more importantly, it fails to appreciate that the reference to a state court "adjudication" of a claim, resulting in a "decision" that was "contrary to" Federal law, must necessarily embrace both the state court's articulation of the governing legal standard and the state court's application of that standard to the case at bar. An "adjudication" and "decision" in a case obviously disposes of the matter entirely. It makes no sense, then, to read § 2254(d)'s "contrary to" language to be limited to a state court's threshold statement of a proposition of abstract legal principle. Moreover, any such construction flatly ignores what it is that § 2254(d) contemplates may have been "contrary to" Federal law—not the state court's articulation of the law, but rather its actual "decision" in a case.

Third, and more importantly still, this alternative construction neglects the key linguistic differences between the Hatch/Specter compromise (i.e., § 2254(d) as enacted) and the Cox amendment that preceded it. That precursor did contemplate that a "reasonable" state court decision would defeat a claim in federal habeas, even if it was erroneous. By the square grammar of § 2254(d), however, that is not true under the legislation Congress actually enacted. Of course, if a state court did apply clearly established law unreasonably, its judgment would not prevent a federal court from granting habeas relief. Yet the very point of the third concession made by the Hatch/Specter compromise is that a state court decision need not have been unreasonable in order to make federal relief available. Rather, a federal court can award relief if the state court was simply wrong—i.e., if its "decision" was "contrary to . . . clearly established Federal law."

bedrock constitutional principle of an independent judiciary.

Some have suggested that [§ 2254(d)] will limit the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact that come before them on habeas corpus. . . .

I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read [§ 2254(d)] to permit independent Federal court review of constitutional claims. . . .[193]

VI. Analogous Cases Distinguished

If §2254(d) were read to establish the strong "deference" rule that Senator Biden described on the Senate floor, the result would be unprecedented in modern experience. Searching the books, I can find no similar instance in which Congress has even attempted, let alone effected, the kind of flagrant interference with the federal judicial function that such a construction of § 2254(d) would entail. Possible analogies come to mind, but each is readily

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193. Signing statement, *supra* note 27. It is always worrisome to rely on opponents' statements to illuminate the meaning of a pending measure. Yet it is nonetheless true in this instance that Senator Biden appeared to acknowledge in the end that § 2254(d) entailed this focus on previous state court judgments and, for his part, offered at least the hope that the new law would be read to allow federal relief when a state court reached an incorrect result:

> As things now stand, Federal courts take State court decisions very seriously. They are not writing on a blank page and ignoring State court decisions right and left. In fact, court watchers who pay close attention to the cases tell me that Federal courts grant relief only when it is pretty clear that someone's constitutional rights have been violated. So it seems to me that even under this provision, if Federal courts think that State courts are right on the Constitution, they will uphold it. And if they are wrong, they will not. . .
>
> If a Federal court concludes the State court violated the Federal Constitution, that, to me, is by definition—by definition—an unreasonable application of the Federal law, and, therefore, Federal habeas corpus would able to be granted.

142 Cong. Rec. S3475 (daily ed. Apr. 17, 1996).

Senator Levin took the same view of the "contrary to" formulation in § 2254(d):

> [S]everal Members have raised the concern that the reference in the bill to an unreasonable application of Federal law could create two different classes of constitutional violations—reasonable and unreasonable. I vote for the bill because I have confidence that the Federal courts will not do this. I believe the courts will conclude, as they should, that a constitutional error cannot be reasonable and that if a State court decision is wrong, it must necessarily be unreasonable . . . .
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> I note that this provision permits a Federal court to grant a petition for habeas corpus if the State court decision was contrary to Federal law. I interpret this language to mean that a Federal court may grant habeas corpus—on a first petition—any time that a State court incorrectly interprets Federal law and that error is material to the case.

Id. at S3465.

distinguishable.

A. *The Tax Injunction Act*

The Tax Injunction Act is clearly a different matter entirely. That statute deprives a federal court of jurisdiction to issue injunctive or declaratory relief with respect to state taxes, provided the plaintiff has a "speedy and efficient" state remedy.[194] In taxation cases, then, a federal court either has jurisdiction to act or it does not, and if it does it is authorized and obligated to adjudicate legal and mixed issues in the conventional, independent manner—without deference to a different judgment by any other authority.[195]

B. *The Administrative Law Cases*

Nor do the administrative law cases offer a plausible analogy. To be sure, the Supreme Court has held that, so long as an agency's construction of a statute is not plainly foreclosed by the statute itself, a federal reviewing court must accept the agency's construction, so long as it is "reasonable."[196] In the administrative law context, however, the Court has merely recognized that Congress can delegate legislative power to an agency and then can ask a federal court to respect the law the agency produces—when the court exercises its own, independent appellate jurisdiction. Thus when a federal court accepts a "reasonable" agency determination, it only gives effect to Congress' previous decision to delegate the law-making reflected in that determination to the agency.

If the court were not to give effect to the agency action and were, instead, to reach its own judgment on the legal or mixed question in issue, the court would frustrate Congress' choice to delegate legislative power to the agency rather than to exercise legislative power itself—simply by enacting the underlying statute and leaving it to the courts to elaborate its meaning. By accepting a "reasonable" agency determination, an Article III court respects Congress' choice to share legislative power with the agency. Con-

194. 28 U.S.C. § 1341 (1988).

195. *See* California v. Grace Brethren Church, 457 U.S. 393 (1982). Decisions regarding the Johnson Act, 28 U.S.C. § 1342, are in accord. *E.g.*, Bridgeport Hydraulic Co. v. Council on Water Co. Lands of Conn., 453 F. Supp. 942, 953-954 (D. Conn. 1977), *aff'd*, 439 U.S. 999 (1978).

196. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984); *see* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982) (holding that if a statute directs an agency to exercise discretion, the judgment the agency reaches is subject to judicial review only to determine whether it is "arbitrary").

gress bifurcates matters—reserving some policy questions for the agency (and thus immunizing them from independent judicial review), while assuming responsibility for other policy questions itself (and thus subjecting its own statute to independent judicial examination). In any case, of course, the court takes full responsibility for determining the nature and contours of the power Congress has assigned to the agency and for elaborating any legislative standard that Congress has not seen fit to delegate.[197]

In the habeas context, by contrast, Congress is not in a position to delegate law-making authority to state courts and, then, to effectuate that delegation by instructing the federal courts to accept state court decisions. There is no federal nonconstitutional law to be made in these cases—which turn, of course, on federal constitutional law. So there is no sensible argument that Congress can somehow force an Article III court to embrace a previous state court decision on the theory that in doing so it merely effectuates Congress' delegation of law-making authority to the state courts.[198]

C. *Judicial Enforcement of Previously Validated Regulations*

The rare instances in which Congress has divided decision-making authority for a case between two Article III courts have no bearing here. To be sure, in *Yakus v. United States*,[199] Congress successfully called on a federal district court to enforce an agency regulation without itself examining the validity of the regulation. In that case, however, the defendant had previously been given an opportunity to challenge the regulation in the Emergency Court of Appeals. That being true, the Supreme Court approved Congress' scheme, notwithstanding its novelty. It was, after all, a short-term, war-time measure affecting the national security. Even at that, the decision in *Yakus* was hotly contested. A dissent by Justice Rutledge raised serious constitutional objections at the time, and theorists have brooded over the decision ever since.

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197. *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983).

198. The Court drew essentially this same distinction in First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995). In that case, the Court confirmed that, under *Chevron*, all federal courts give "a degree of legal leeway" to an agency interpretation of law within the agency's purview. *Id.* at 1926. Yet no federal court gives any similar leeway to another federal court's decision to uphold an agency judgment. This is so, because the underlying federal statute assigns law-making authority to the agency in the first instance, and the first court to examine the agency's work must recognize as much. Once such a court has accepted an agency decision, however, there is no justification for extending any similar deference to that judicial judgment. Instead, the ordinary standard is appropriate: "questions of law are examined *de novo*." *Id.*

199. 321 U.S. 414 (1944).

Whatever may be the currency of *Yakus* within its own narrow field today, there are two solid reasons why that case cannot support forcing an Article III court to surrender decision-making authority regarding a constitutional question raised in a habeas corpus petition. First, *Yakus* approved only a congressional scheme to distribute jurisdiction between two Article III courts. However troublesome that may be, it does arguably conform to the bedrock understanding that Congress has considerable authority to prescribe the jurisdiction of such courts. A scheme that confers jurisdiction on an Article III court to entertain an action, but then instructs the court to give effect to a state court judgment regarding a federal question, is quite a different matter.

Second, and more fundamentally, *Yakus* sustained a pure bifurcation of judicial power. The Emergency Court of Appeals was given jurisdiction to determine the validity of regulations, and the district court was given jurisdiction to enforce regulations against alleged violators. Each court was confined to its own sphere, and neither was asked to meddle with work assigned to the other. Here, by contrast, the "strong deference" construction of § 2254(d) would have it that judicial authority is orchestrated in an entirely different way. It is not that the state courts are given independent decision-making power with respect to one issue, while the federal district courts are given independent decision-making power with respect to other issues. Rather, the district court's decision-making power is made contingent on the quality of the previous state court judgment. There is no clean demarcation of jurisdiction, but an overlap—which threatens the independence and integrity of both courts. Nothing in *Yakus* endorses congressional action that so corrupts the judicial function.

D. *The Adequate State Ground Doctrine*

There is no analogy to cases in which, when reviewing a state court decision on writ of certiorari, the Supreme Court accepts as authoritative a state court's interpretation of state law and limits itself to any federal issues properly before the Court. In those cases, as in cases like *Yakus*, Congress (if not the Constitution itself) simply distributes jurisdictional power for different questions between two courts. The state court has exclusive power to decide purely state law issues, while the Supreme Court has equally exclusive power to decide federal questions that must be determined in order to resolve the dispute.[200] In no sense do the two courts share authority with respect to a single legal issue, with the one denied

200. *E.g.*, Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

power to decide that question independently, but, instead, forced to credit the judgment of the other notwithstanding disagreement.

So far from supporting the notion that Congress can deprive an Article III court of proper jurisdiction the authority to decide a legal issue independently, the adequate state ground cases stand squarely against any such proposition. Those cases fully respect the fundamental understanding that, as an irreducible minimum, *any* court, state or federal, is entitled to decide legal and mixed issues over which it has ultimate jurisdiction, free of any external interference. A state court with authority to render a final decision on a state law issue is absolutely entitled to reach the judgment it thinks appropriate. And the Supreme Court, with ultimate authority to render a final decision on a properly postured federal question, is also entitled to reach the judgment it finds to be correct—free of any responsibility to adjust that judgment according to the views of a state court.[201]

E. *Appellate Review of Judicial Fact-Finding*

Finally, there is no analogy in the conventional rule that a federal appellate court will not typically upset a trial court finding of historical fact, unless it is "clearly erroneous."[202] Trial court findings of fact, as opposed to determinations of law or mixed questions of law and fact, have always enjoyed a large measure of deference on appeal, for reasons that are well documented in the Court's decisions.[203]

By contrast, the Supreme Court has often recognized that trial judges are in no better position than appellate judges to identify and articulate the legal standard applicable to the facts of a case or to apply the appropriate legal standard to those facts.[204] There is, then, no tradition of deference to trial court decisions regarding purely legal or mixed questions, and arguments for such deference in isolated circumstances have uniformly failed. As the Supreme Court has explained: "The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a

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201. Arizona v. Evans, 115 S. Ct. 1185, 1190 (1995) (reiterating the familiar proposition that state courts are not free to interpret the Constitution at variance from the interpretations of the Supreme Court). Alternatively, these cases have something in common with the cases on judicial review of administrative action. Here, as there, an Article III court may validly be asked to accept decisions of another entity—to the extent that entity has independent authority to make the decision in issue.

202. *E.g.*, FED. R. CIV. P. 52(a).

203. *E.g.*, Anderson v. Bessemer City, N.C., 470 U.S. 564 (1985).

204. *E.g.*, Salve Regina College v. Russell, 499 U.S. 225, 238-39 (1991).

lower court's determinations [of law]."[205]

The resulting conventional distinction between fact and law runs deeper even than this in American constitutional law. It rests not merely on solid, practical, functional grounds—but also on the fundamental character of judicial power pursuant to Article III. Bluntly stated, an appellate court can extend significant deference to trial court findings of fact without surrendering its core responsibility to "say what the *law* is" with respect to those facts. The crucial point of the cases on appellate review of fact-finding is not, then, that Congress has better reasons for instructing appellate courts to defer to findings of fact than Congress can possibly have for instructing those courts to defer to trial court conclusions of law. Rather, the point is that there are basic, Article III reasons why Congress has always respected the fact/law distinction.

VII. Conclusion

There is no justification for reading into Pub. L. 104-132 a dramatic transmutation of the federal habeas corpus jurisdiction and its place in the machinery of American justice. Instead, this important new statute can and should be given the meaning its plain language and context command. After a long absence, Congress has revisited this vexing field of federal courts law, primarily to make procedural adjustments meant to streamline and expedite the processing of cases, but also to prescribe statutory answers to problems the Court had previously addressed via the *Teague* doctrine—in cases that have now been legislatively overruled.

Within this framework, the interpretation of § 2254(d) that

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205. *Id.* at 231. *Accord* First Options of Chicago v. Kaplan, 115 S. Ct. 1920, 1926 (1995) (confirming that the "ordinary" standard for reviewing questions of law is the "de novo" standard—and explaining that "it is undesirable to make the law more complicated by proliferating [more than these conventional] review standards without good reasons").

The discussion of mixed questions in Miller v. Fenton, 474 U.S. 104 (1985), is not to the contrary. The Court in that case did not suggest that an appellate court may properly give "deferential review" to a lower court judgment regarding a mixed question if it appears that the lower court is better positioned to decide the relevant mixed issue. *Id.* at 112. Instead, the Court held that the identification of an issue (as factual, legal, or mixed) in the first instance is sometimes influenced by the reviewing court's sense of the better allocation of judicial authority: "Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." *Id.* at 113-14.

A court's judgment about the proper allocation of power may have some effect, then, but only at the threshold—when the "status" of a question as factual, legal, or mixed is initially determined. *Id.* at 114. Once an issue has been identified as mixed, however, *Miller* is clear that the issue is a matter for "independent" determination. *Id.* at 113.

best fits both its precise text and its obvious history is not, then, all so startling. This interpretation can be coordinated with the existing statutory and case law structure without undue disruption and, into the bargain, it raises no serious constitutional difficulty. The point of § 2254(d) is to dispense with a peculiar understanding of the "*de novo*" standard that had grown up around federal habeas corpus for state prisoners—and implied that the federal courts should ignore prior state judgments entirely. Under this new provision, however, the federal habeas courts are obliged to focus explicitly on a previous adjudication on the merits in state court and to decide forthrightly whether the state court reached the correct outcome.

In the end, then, Pub. L. 104-132 calls on the federal courts to respect the state courts and their efforts to enforce federal law. And it doubtless conveys a serious legislative desire that the federal courts exercise restraint in habeas cases. But it does not dismantle the habeas system as some observers, myself included, had feared it would.